



Royal African Society



Courting Conflict?

Justice, Peace and the ICC in Africa

Edited by Nicholas Waddell and Phil Clark



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About The Royal African Society

Now over 100 years old, the Royal African Society is Britain's primary Africa organisation. Through its journal, *African Affairs*, and by organising meetings, discussions and other activities, the Society strengthens links between Africa and Britain and encourages understanding of Africa and its relations with the rest of the world.

The Society, based at the School of Oriental and African Studies (SOAS) in London, has over a thousand members and has branches in Bristol and Scotland. The Society's Director is Richard Dowden, a journalist working on Africa for more than 20 years and formerly Africa Editor of *The Independent* and *The Economist*. For further information, see: **www.royalafricansociety.org**

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Cover image: militia leader Germain Katanga sits in the courtroom of the International Criminal Court, The Hague.

ROBERT VOS/AFP/Getty Images

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List of Abbreviations

AU	African Union
CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
DRC	Democratic Republic of Congo
EU	European Union
FNI	<i>Front des Nationalistes et des Intégrationnistes</i>
FRPI	<i>Force de Résistance Patriotique en Ituri</i>
ICC	International Criminal Court
ICID	International Commission of Inquiry into Darfur
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
LRA/M	Lord's Resistance Army/Movement
MONUC	<i>Mission des Nations Unies en République Démocratique du Congo</i>
NGO	Non-Governmental Organisation
OTP	Office of the Prosecutor
SAF	Sudanese Armed Forces
SLA	Sudan Liberation Army
UN	United Nations
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UNSC	United Nations Security Council
UPC	<i>Union des Patriotes Congolais</i>
UPDF	Ugandan People's Defence Force

Foreword

Justice Albie Sachs

There is nothing continentally-specific about crimes committed during conflict. Yet the first investigations of the International Criminal Court (ICC) are concentrated in Africa. The absence of direct Great Power involvement in these conflicts might make Africa more susceptible than other parts of the world to such investigations. However, this is not a reason for seeking impunity for our continent, but rather a call to ensure that the work of the ICC extends wherever it is needed throughout the world.

Africa is showing itself to be a strenuous testing-ground for the future work of the ICC. The contributors to this thoughtful and balanced collection have all themselves worked in harsh African terrain. They engage critically with the ICC while remaining mindful of the contending pressures on its work. The multiple perspectives that they offer indicate that this is not a zone of simple truths.

The authors show convincingly that to place prosecutorial justice and the attainment of peace into opposed, abstract categories comes at the expense of an informed analysis of where tensions, do, and don't, exist on the ground. The relationship between ensuring accountability and ending conflict is inherently complex and dynamic. As in so many areas where law impacts on public life, context is everything. This collection demonstrates that to deal with the state and non-state perpetrators of atrocities, and to attain the necessary range of goals, multiple institutional and social responses are required. In this respect, it would be loading too much on the ICC to see it as the sole mechanism for delivering justice (in the fullest sense of the word). National systems of justice must be strengthened to deal effectively with past abuses. Appropriate forms of truth-telling and reparation can do as much as, or even more than, criminal prosecution to restore the dignity of afflicted communities. Victims must be involved.

Another important consideration is to avoid placing too much pressure on the ICC to produce a scorecard of successful prosecutions. The success of the ICC should be evaluated not just to the extent that it punishes past atrocity, but also in terms of the effect its investigations have on reducing abysmal conduct in the present and future.

While decrying ghastly conflict on our continent, we in Africa observe that many here are willing to provide leadership and support for the goals of the ICC. Without engaging in polemics and denunciations, and through the authenticity of the manner in which they communicate their perspectives, the contributors to this volume provide a rich and telling account of the first steps of the newly-created ICC.

Albie Sachs

Constitution Hill, Johannesburg, 17 January 2008.

1. Introduction

Nicholas Waddell and Phil Clark

The current period is a formative one for the International Criminal Court (ICC). Half a decade since its statute entered into force, there have recently been a series of key developments in the Court's operations. These include new investigations and arrest warrants, preparations for the Court's first trial and the second and third transfers of ICC suspects into custody in The Hague. Such steps mark the ICC's transition from an aspiration to an operational reality – one that is wrestling with the practical difficulties of executing its mandate. The Court's recent activities set important precedents for its future operations and give tangible indications of the ICC's evolving policies, strategies and role. Most importantly, they raise the issue of the ICC's impact on the ground and of the Court's early contribution to the societies it is arguably supposed to be assisting most directly.

The ICC is a permanent international body, established to prosecute those responsible for war crimes, crimes against humanity and genocide. It has a global mandate but its activities have concentrated on African countries marked by ongoing violent conflict. Crimes committed in the Democratic Republic of Congo (DRC), northern Uganda, Darfur and Central African Republic are the subject of its first investigations and prosecutions. These societies confront simultaneous needs for sustainable peace, accountability, institutional reform and the mending of fractured relationships.

The ICC's operations in Africa have encountered significant difficulties. While the work of the Court has taken concrete shape, so have its challenges. The title of this collection, *Courting Conflict?*, alludes to the inherent problems of pursuing justice in the midst of violence. It also points to the tremendous controversy generated by the ICC's work to date – not least the charge levelled at the Court that its actions risk prolonging conflict by jeopardising peace deals.

This collection investigates the politics of the ICC's interventions in Africa.¹ Rather than exploring the progress of the ICC *per se*, the essays address Africa's encounters with the Court and the Court's encounters with Africa. The authors avoid treating African countries simply as a geographical arena for a new international justice body. They also resist discussing the ICC in legal terms only. Instead, the essays situate debates about the Court in specific social, cultural and political contexts where contending local, national and international pressures apply. The contributors address the ICC's relationships with the governments, non-state groups, national judiciaries and local populations of the countries where it is active. Coverage of the ICC has often belied the complexity of these relationships and has either romanticised or demonised the Court's interventions. These essays take the form of short comment pieces, written to stir and broaden debate on the ICC but also to help move it beyond the sensational and oversimplified.

The ICC's advent and recent developments

According to the preamble to the ICC's Statute, the Court's stated aim is to 'end impunity' for the most serious crimes of international concern and to contribute to their prevention. Based in The Hague, the Court has jurisdiction to prosecute individuals for war crimes, crimes against humanity and genocide. Unlike temporary, context-specific tribunals set up by the UN Security Council (such as those for Rwanda and for the former Yugoslavia), the ICC is a permanent body born of a multilateral treaty. The statute governing the Court was adopted by 120 states in Rome in 1998. In what was hailed as a landmark achievement for an international justice movement, the Rome Statute entered into force in July 2002 – thereby establishing the International Criminal Court.

Instead of delving into atrocities of decades passed, the ICC can only investigate crimes committed after the Rome Statute took effect.² This temporal jurisdiction, allied with the ICC's permanent status and international mandate, has drawn the Court into situations where conflict is active or barely concluded. Seeking to dispense criminal justice *during* conflict and even in parallel with peace processes represents an ambitious vision for international justice – one that endeavours to reverse the historical trend of justice being postponed or bartered away as part of peace deals.

The recent period has been hugely significant for the ICC. In the DRC situation, the Court has confirmed charges against its first accused in the dock, Thomas Lubanga, and transferred two further suspects to custody in The Hague, Germain Katanga and Mathieu Ngudjolo. Regarding Darfur, the ICC has issued two arrest warrants – for the government minister, Ahmed Haroun, and for the militia leader, Ali Mohamed Abdel Rahman 'Kushayb'. The Court has also opened investigations in Central African Republic. Meanwhile, the northern Uganda peace efforts have seen intense negotiations around the ICC's warrants for leaders of the rebel Lord's Resistance Army. In its wider operations, the Court has taken steps to establish its field presence and has taken crucial decisions regarding the participation of victims in its work. At the same time, most of the warrants issued by the ICC remain outstanding and the situations in Uganda and Sudan are finely poised. With the Court's first trial (that of Lubanga) due to commence in 2008 and with indications from the ICC Prosecutor that new warrants are likely, the current period is defining for the first global criminal court.

The ICC in Africa

Controversies over the establishment of this new international justice body have overshadowed what it means for the African countries where the Court is taking its first steps. The fact that the ICC has focused so overwhelmingly on African situations speaks partly to the prevalence of violations of international criminal law in Africa but also prompts questions about why the gaze of international criminal justice falls in some places and on some people and not on others. The ICC is designed as a 'court of last resort' that backs up national jurisdictions rather than trumps them. Nonetheless, the Court's focus on Africa has stirred African sensitivities about sovereignty and

self-determination – not least because of the continent’s history of colonisation and a pattern of decisions made for Africa by outsiders. Africa also manifests a pattern of political elites manoeuvring to ensure that interventions by international institutions ultimately play to their advantage. Furthermore, as Graeme Simpson’s essay in this collection points out, the Court’s ‘cultural relevance,’ as a supposed embodiment of ‘western’ legal norms, has been questioned, as has the extent to which the pursuit of criminal justice through international channels can further or undermine the pursuit of other goals such as peace and reconciliation.

The ICC has experienced difficulties in navigating the political terrain of Africa. Many of these difficulties emanate from the inherently emotive, morally fraught and politically charged nature of the atrocities that the ICC was established to address. Further features of the ICC’s mandate, such as its minimal temporal jurisdiction and reliance on the support and cooperation of nation states – both domestically and internationally – limit the Court’s room for manoeuvre. The ICC also confronts immense practical and logistical problems of conducting investigations and engaging with affected populations in highly insecure environments.

Notwithstanding these constraining factors, the early record of the ICC in Africa deserves to be scrutinised critically. In conflicts involving atrocities committed by multiple conflict parties, the prosecution of individuals from certain factions and not others is especially significant for people living in the most affected areas. Perceptions of the ICC on the ground have at times been damaged by insufficient efforts by the Court to make clear the basis on which individuals have been the subject of warrants and of particular charges, while those of apparently equal culpability have not. It is also evident that the ICC has not always forged strong relations with other actors who are critical to the Court’s ultimate success.

As highlighted by some of the essays in this collection, the ICC has often attracted controversy by failing to communicate its aims and methods clearly and consistently. Mindful of the need for a young institution to win backing, the Court and its supporters have expressed alternately inflated or modest visions of what can be achieved. Expectations of the ICC have often been excessively high but the Court itself has a role in managing expectations. Not all the ICC’s difficulties can be attributed exclusively to the unrealistic demands sometimes made of it, to misunderstandings of its role and to the inevitable difficulties of executing its mandate.

The collected essays

The first two essays in this collection explore the tensions that can arise between the advancement of peace and of justice. Nick Grono and Adam O’Brien argue that it is disingenuous to suggest that it is always possible to further the interests of peace and justice simultaneously. The reality of peacemaking, they argue, shows that difficult choices must sometimes be made between justice and peace objectives. The crucial thing, they underline, is to acknowledge these tensions fully and to weigh the contending pressures in specific contexts.

Michael Otim and Marieke Wierda suggest that such careful weighing is exactly what has so far occurred at the Juba talks, aimed at ending Uganda's 20-year conflict. Focusing on negotiations over reconciliation and accountability, they explore efforts to reach an agreement that is acceptable to the conflict parties yet consistent with the provisions of the ICC Statute. They argue that such efforts, combined with initiatives to solicit the views of affected communities, break new ground in bridging local pressures and global legal obligations. Seen in this light, the ICC has not been a hurdle to peace so much as a spur to the rigorous treatment of accountability issues at Juba.

The next two chapters consider the politics of the ICC's prosecutorial strategies. The ICC has no enforcement mechanism of its own and relies on state cooperation for the apprehension of suspects. In the DRC, it was the Congolese authorities that arrested the first three persons in the Court's custody. In contrast, the Darfur situation was referred to the ICC by the UN Security Council rather than by the state itself. In Sudan, the issuance of warrants – including for a government minister – has met with defiance from the Khartoum regime. Alex de Waal illustrates how the ICC's frustrated efforts to enforce its warrants are inextricably linked to the international politics of the Darfur conflict. Rejecting criticisms that the ICC has been insufficiently ambitious in its selection of cases in Sudan, de Waal also commends the ICC's efforts to head off, and then to minimise, damaging confrontation with the Khartoum administration.

This perspective contrasts with Phil Clark's reflection on ICC case selection and prosecutorial strategy in the DRC and northern Uganda. Clark examines the factors that have determined where, whom and what the ICC has decided to investigate and prosecute. The ICC's approach, he argues, has been skewed by the Court's prioritisation of its short-term institutional interest in 'making its mark.' Regarding both countries, the absence of prosecutions of state actors has been motivated partly by the Court's concern to avoid jeopardising relationships upon which it relies for its daily operations. Such an approach, Clark argues, has undermined the Court's legitimacy in the eyes of local populations.

Concerns over the ICC's local legitimacy accounts partly for the interest in 'traditional justice' – the subject of Tim Allen's essay. Traditional justice has been promoted as a more reconciliatory 'grassroots' alternative to the international retributive justice represented by the ICC. Focusing on northern Uganda, however, Allen argues that community-based rituals are poorly understood and that proposals to adapt them in the current context are largely misguided. He argues that much of external actors' promotion of traditional justice measures amounts to northern Uganda exceptionalism – treating northern Ugandans as though they are somehow alien from the rest of the country and singling out northern Ugandan rituals as responses to mass conflict. Instead, he says, a nationwide approach is necessary.

The two essays following Allen's examine the role and impact of the ICC beyond its own investigations and prosecutions. Géraldine Mattioli and Anneke van Woudenberg ask how far the ICC should go to support investigations and trials in the national courts of countries where it is active. Can the ICC be a global catalyst for national prosecutions? Or, would efforts to play such a role over-extend the ICC's mandate and capacity and potentially compromise it by forcing it to engage too closely with corrupt or fragile domestic institutions? The authors argue that, while these dangers are real, examples from the DRC show that the

Court could nonetheless grasp opportunities for ‘positive complementarity’ and, in doing so, have a more significant and enduring impact at the local level.

Mariana Goetz also examines the local impact of the ICC in terms of how the Court can best make its work relevant to victims and affected communities. International justice institutions have been heavily criticised for their detached approach to the societies they purport to assist and in particular for marginalising or excluding victims. The ICC’s mandate includes novel provisions for victim involvement but the implementation of these provisions and their implications for other areas of the Court’s operations have been controversial. According to Goetz, the practical commitment within the Court to exercising victim provisions is uncertain. For Goetz, the Court also has to make up for lost time with respect to community outreach.

Graeme Simpson closes the collection by addressing what he argues has been the caricatured and reductionist treatment of dilemmas raised by the work of the ICC. He argues that polarised debates about the Court, particularly over supposed incompatibilities between international justice and domestic peace, have hampered efforts to consider peace, justice and reconciliation in a more integrated way, and to recognise the potential for these goals to be mutually reinforcing. Rather than debates focusing on the ICC in singular terms, argues Simpson, the Court should be seen in the context of, and co-existing with, a range of other mechanisms and institutions that can complement one another.

Conclusion

This collection explores the work of the ICC at a critical stage in its evolution. Given that the ICC is still defining its own role and strategies, it is perhaps unsurprising that it is also still defining its relations with domestic governments, judiciaries, populations and other actors. Questions about the identity and ultimate purpose of the Court are especially complicated in the African context, given the fraught nature of many other forms of international intervention on the continent. The ICC is wrestling with the central question that has confronted previous international justice institutions: what, and for whom, is international criminal justice ultimately for? Is it intended to fulfil a moral obligation to prosecute those chiefly responsible for the most serious crimes? Is it to deter future criminality? Should it help to improve the material conditions of victims and affected communities? And how far should it attempt to contribute to wider social goals such as peace and reconciliation? As these essays demonstrate, not all such roles can necessarily be advanced simultaneously and harmoniously. They also show that while genuine tensions exist, casting the issues as a series of head-on collisions between neat categories (peace versus justice, local versus international approaches, punishment versus reconciliation etc.) is a poor guide to the complex realities on the ground. In terms of the ICC’s contribution, much depends on the Court’s capacity to absorb early lessons and to demonstrate a clear role – both in its own right and in relation to other judicial and non-judicial initiatives.

- 1 The essays follow on from a series of London meetings designed by the authors and organised principally by the Royal African Society. See N. Waddell and P. Clark (eds.), "Peace, Justice and the ICC in Africa", Meeting Series Report, London: Royal African Society, March 2007. Available at: www.royalafricansociety.org/documents/Peace,JusticeandtheICC-seriesreport.pdf.
- 2 Unsurprisingly, states' negotiators preferred not to risk exposure to retrospective justice by granting the ICC a temporal mandate that included past crimes.

2. Justice in Conflict? The ICC and Peace Processes

Nick Grono and Adam O'Brien

Introduction

The International Criminal Court (ICC) is now investigating or prosecuting individuals involved in three of the most devastating conflicts in Africa – Darfur, northern Uganda and the Democratic Republic of Congo (DRC).¹ In each case, the ICC has been forced to confront the challenges inherent in pursuing peace and justice simultaneously. What happens – and what should happen – when efforts to prosecute perpetrators of mass atrocities coincide with a peace process? What is the best approach when the price of a peace deal may be a degree of impunity for those most responsible for such abuses?

One common and convenient response is to hide behind truisms and make general statements of principle to the effect that no trade-off is required because peace and justice are inextricably linked. Clearly peace and justice are complementary in that justice can deter abuses and can help make peace sustainable by addressing grievances non-violently. But good things don't always go together, and to present peace and justice as invariably mutually reinforcing is misleading and unhelpful when the difficult reality of peacemaking often proves otherwise.

We review below arguments surrounding the ICC's impact on prospects for peace in Uganda and go on to offer some general considerations that international policymakers should heed when seeking to balance peace and justice demands.

Doing deals with perpetrators

The potential clash between peace and justice objectives can sometimes be circumvented by pursuing a sequential approach – for example, by getting a peace agreement now, then dealing with justice many years later. This is what has been happening in Latin America a decade or two after transitions to democracy. However, most of those transitions explicitly granted amnesty to enable handovers of power, and it is only many years down the track that those amnesties are being wound back.

A further response is to acknowledge the tensions between peace and justice and to recognise that pragmatism and recent history indicate that justice cannot always claim primacy. While impunity for people who have committed the gravest acts of inhumanity is morally repugnant, sometimes doing a deal with perpetrators is unavoidable and necessary to prevent further conflict and suffering. This is partly because the reality of conflict is such that multiple warring parties are likely to have committed atrocities. Unless one party has been utterly vanquished, peace negotiations will often assemble parties

responsible for grave abuses and a deal will depend on their agreeing to end the conflict. Because perpetrators are unlikely to want a prison cell as a reward for their hard-won peace agreement, mediators have frequently used amnesties as an incentive.

Recent agreements backed by the United States and the European Union, for example, have involved deals between serial abusers and either implicitly or explicitly provided impunity: the 2001 Bonn Agreement that set up a new government in Afghanistan; Sun City and related agreements that formally ended the DRC conflict in 2003; and Sudan's 2005 Comprehensive Peace Agreement (CPA) as well as the Darfur Peace Agreement in 2006. While none of these agreements features explicit amnesties (unlike the Lomé Agreement in Sierra Leone) and some of them have token transitional justice provisions, they are largely silent on accountability for past atrocities, despite the fact that some of the biggest rights abusers are party to these agreements, or were put into power by them.

More than four million people have died during the DRC's civil war and its aftermath. Conflict in Sierra Leone cost hundreds of thousands of lives. The toll in Darfur is increasing daily. It is tempting and understandable to take a righteous stance and say that deals should not be done with those responsible for atrocities. However, it is difficult to tell victims of these conflicts that the prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face.

On the other hand, there is the issue of the role of prosecutions in preventing future atrocities. While mediators are inclined to insist that conflict resolution necessitates that all options, including full amnesty, must be on the table, this insistence ignores the very important deterrence impact of international prosecutions, let alone fundamental moral considerations. By discounting this deterrence dimension we miss a potentially valuable way of reducing the prospect of atrocities in years to come. The conflict in northern Uganda and the current peace process provide a case study in which all of these difficult issues are in play.

Northern Uganda

For the last 20 years, the people of northern Uganda have suffered at the hands of the vicious Lord's Resistance Army (LRA), and have been penned in by the brutal response of the Ugandan government. The LRA's leaders, headed by the mystic Joseph Kony, claimed to be on a spiritual mission to cleanse northern Uganda and to rule the country according to the Ten Commandments, but have recently tried to recast themselves as freedom fighters for the politically and economically marginalised region. Regardless of their motivations, the LRA has unleashed a reign of terror primarily on the people of northern Uganda, abducting tens of thousands of children and adults, turning them into rebel soldiers, porters and sex slaves, and killing or mutilating indiscriminately.²

Unfortunately, the Ugandan government's response has been little better than the problem it purports to address. The government herded over a million of the north's inhabitants (predominantly Acholi) into squalid, insecure camps – condemning them to a life removed from their fertile land, with little hope for a productive future. Every week, according to

the government's own statistics, a thousand people on average die from conflict-related disease and malnutrition.³

For the first time in around a decade, a sustained peace process is taking place between the LRA and the Ugandan government. The talks are occurring in Juba, Southern Sudan, mediated by the Government of Southern Sudan. One complicating factor in the negotiations is that the ICC is prosecuting the leadership of the LRA. The ICC has come under intense criticism in northern Uganda since the announcement in January 2004 that the Ugandan government had made the first state party referral to the ICC. The Court has been condemned by a wide range of international NGOs, academics, mediators and northern Ugandans. These critics argued that the threat of international prosecutions would undermine fragile local peace initiatives; would prolong the conflict by obliterating the LRA's incentive to negotiate; and would make displaced northern Ugandans even more vulnerable to LRA attacks. In addition to criticising the timing of the ICC's investigation, some observers asserted that the Court's brand of retributive punishment was fundamentally at odds with local values, enshrined culturally in traditional reconciliation ceremonies and legally in Uganda's Amnesty Act of 2000. The ICC's intervention, opponents argued, would ultimately perpetuate rather than prevent conflict.⁴

Some three years later, the exact opposite has happened. We are in the midst of the most promising peace initiative in the last 20 years; one that has dramatically improved the security and humanitarian situation in northern Uganda. A landmark cessation of hostilities agreement removed most LRA combatants from Uganda, allowing hundreds of thousands of war-weary civilians to begin the process of resettlement and redevelopment. The elusive and erratic LRA has tentatively begun to open up, building lines of communication with both northern Ugandans and the government. These emerging signs of trust and confidence help to promote reconciliation and to pave the way home for displaced populations. Rather than driving the LRA back into the bush, the rebels have been drawn in to negotiations. Rather than making civilians more vulnerable, northern Uganda is safer and life is slowly improving.

How did we get here? We need to be careful about placing too much credit at the feet of the ICC. An array of political and military developments in the region – most notably the signing of Sudan's CPA and improved performance by the Ugandan army – have increased the costs of continued conflict for the LRA. These shifts have cut off the rebels' room for tactical and strategic manoeuvre and have compelled the LRA leadership to explore a negotiated settlement more vigorously than in the past.

We would argue that the ICC's investigations played an active, positive role in encouraging and reinforcing these regional trends for the following four reasons.

First, the threat of prosecution clearly rattled the LRA military leadership, pushing them to the negotiating table. Joseph Kony and the LRA commanders are acutely aware that the ICC hangs as a sword over their heads. The issuance of arrest warrants in particular created an incentive to reach a settlement. It may be that the LRA's decision to pull most of its troops out of northern Uganda and to issue standing orders not to attack anyone in the area is in part due to deterrence by the ICC. The LRA continues to attack civilians in Southern Sudan, perhaps in the belief that it is beyond the geographic limits of the referral.

Second, the ICC's investigation made it more difficult for the LRA to enjoy continued support from its key foreign ally, Sudan. Beginning in 1994, Khartoum provided an umbilical cord to Kony in the form of a steady stream of weapons, training and transportation. For Khartoum, the ICC's case increased the stakes for supporting the LRA and prompted the Government of Sudan to sign a 2005 memorandum of understanding with the Court to cooperate with arrest warrants issued against LRA commanders. Regardless of whether Khartoum actually fell within the orbit of the ICC's criminal investigation, the threat had a deterrent impact.

Some caution is necessary here. Other factors may have been more significant than the ICC in influencing Khartoum's calculations and decision to desist from supporting the LRA to the same extent as in the past. Pursuant to the CPA, for example, the Sudanese Armed Forces (SAF) pulled out of Southern Sudan, cutting off the LRA's supply lines and depriving the rebels of bases of sanctuary.

Third, the ICC's investigation raised awareness and focused the attention of the international community, which in turn provided a crucial broad base of regional and international support for the fledgling peace process. One of the key problems of previous peace initiatives was weak external support. Now, in Juba, the international community has stepped up its engagement, and the UN and a number of countries are providing significant support for the talks.

Fourth, the ICC's attempt to hold the LRA leadership criminally liable for its atrocities in northern Uganda has embedded accountability and victims' interests in the structure and vocabulary of the peace process. The third point on the five point negotiating agenda is devoted to reconciliation and accountability. The parties to the talks have accepted, in principle, that robust accountability (in the form of a special chamber of the High Court and community-based rituals) is inevitable – although we should remain very sceptical of the LRA's commitment to this principle. Whether sincere or not, the LRA is being pushed towards accountability on multiple fronts by multiple actors. Consultation with the victims will play a crucial role in attempting to devise robust local accountability mechanisms. The ICC's impact is apparent insofar as this has never happened in previous initiatives with the LRA or any of the other myriad rebel groups that have emerged in Uganda since President Museveni came to power in 1986.

Some policy considerations

While the ICC's overall contribution to the prospects for peace in Uganda has been positive, the tension between peace and justice comes into sharpest relief when the detailed provisions of a peace deal are being negotiated. Foremost among the obstacles to a Juba agreement (let alone the implementation of such a deal), is the conflict between the ICC prosecutions and the desire of the LRA's leaders for full or substantial impunity. Kony and his commanders state that they will not do a deal unless and until the ICC prosecutions are dropped. Fear of arrest means that they avoid Juba and issue instructions by satellite phone.

As the ICC Prosecutor continues to investigate participants in ongoing, or recently ended, conflicts, the international community will increasingly confront these peace and justice dilemmas. How should it balance the range of competing, and often

conflicting, public policy goals in such situations? There are no clear-cut answers to these problems. Instead, we set out below some of the key considerations that policymakers should take into account when confronted with such issues.

Prosecution by the ICC is one of the few credible threats faced by leaders of warring parties

One of the main challenges for international policymakers in their efforts to resolve conflicts is that they often lack incentives or sanctions of sufficient credibility to influence the calculations of the warring parties. To take Sudan as an example, the threat of prosecution has been practically the only credible threat applied to the Khartoum government over the last few years – largely because the UN Security Council has itself been unwilling to take the tough decisions, and has instead been happy to outsource the ‘bad cop’ role to the ICC. The threat of prosecution – and the examples of Slobodan Milosevic, Charles Taylor, Hissène Habré and others – can have a salutary effect on those contemplating state-sponsored atrocities, but only if there is a real likelihood that they may face the consequences of their policies. Unfortunately, this is a stick that loses much of its deterrent power when actually applied to those still in office. Government officials who are the subject of ICC prosecution have a strong incentive to cling to power at all costs so as to avoid arrest. This will be President Bashir’s tactic in Sudan. Zimbabwe’s President Mugabe has made it clear to associates that the key motivation for his staying in power – and why he will do so until he dies or is removed – is the fear of facing an international tribunal in the future.

The ICC must secure convictions to ensure its credibility and requires strong international support to do so

The ICC needs to secure convictions to ensure its credibility as a deterrent to future perpetrators. This is going to be a challenge. In Darfur and Uganda the Court is going to find it extremely difficult to get hold of those it is prosecuting. And there will always be the risk of its prosecutions being trumped by peace processes.

In Uganda, the Ugandan army has failed to defeat the LRA for more than 20 years. While the Ugandan forces have recently improved their capabilities, the LRA has been able to take refuge in neighbouring countries. The lack of a coordinated response by those countries and the broader international community has ensured that the rebel group has been able to continue its attacks. It also means that the ICC cannot arrest those it wishes to prosecute. If the peace talks fail to achieve a satisfactory outcome, international efforts will have to be redoubled to arrest the indictees.

In Darfur, the Prosecutor will not get any cooperation from Khartoum. After the Prosecutor applied for warrants, President Bashir declared that ‘the government will not hand over any citizen for trial outside the country.’¹⁵ That being the case, the ICC will need strong international support to progress with the Darfur prosecutions. To date, however, the international community has displayed an acute lack of political will in dealing with Khartoum. One hopes, without much optimism, that if and when prosecutions commence, the international community will be shamed into providing more substantive assistance and pressure.

Impunity should always be a last resort

The crux of the whole 'peace versus justice' debate is what should be done when a warring party (or parties) insists that a prospective peace deal is conditional on a halt to international criminal prosecutions. In these circumstances, the overriding policy issue is whether the important but uncertain prospect of deterring future perpetrators and reducing future conflicts takes precedence over more certain benefits of an immediate end to an ongoing conflict. The first point that needs to be acknowledged is that peace deals that sacrifice justice often fail to produce peace. Failed amnesty agreements brokered with the likes of Foday Sankoh in Sierra Leone and Jonas Savimbi in Angola, and their violent aftermath, demonstrate the potential costs of impunity.

In other contexts, however, past deals that have offered limited or full immunity from prosecution have helped bring an end to conflict and instability. One obvious example is the deal with Charles Taylor to get him out of Liberia and to bring an end to the conflict there. In South Africa, outgoing leaders were given amnesty as part of a truth and reconciliation process in an effort to end 34 years of apartheid. The likely alternative was many more years of conflict. In Mozambique, after 16 years of civil war ended in 1992, the Parliament adopted a general amnesty for all fighters pursuant to which reconciliation processes took clear precedence over accountability. The country has been largely at peace since.

The Rome Statute that governs the ICC offers ways to reach a peace deal by including robust accountability mechanisms. Such mechanisms should aim to combine traditional reconciliation ceremonies and formal legal processes in a way that satisfies both the victims' needs for justice and meets the Rome Statute's standards for accountability. Whether or not they meet the Statute's standards would be assessed under Article 17, which requires the ICC, under the principle of complementarity, to defer to a genuine investigation or prosecution by Uganda – if such proceedings were to take place. The Security Council also has the option under Article 16 to suspend an ICC investigation for renewable one-year increments if it considers this to be in the interests of international peace and stability. Such a decision could be taken if there were a peace deal with adequate accountability measures, even if they did not meet the complementarity requirements.

We also need to bear in mind that the ICC may be less of a deterrent to rebel groups than state actors, at least until the late stages of their rebellion, by which time it is too late for them to ameliorate their conduct to escape prosecution. Most rebellions fail, and most rebels embarking on their challenge to the central government are unlikely to be concerned that they may later be prosecuted for their atrocities. For these individuals, survival and success are probably much more immediate concerns. All of this means that, in the Uganda situation, the prosecution of Kony and his fellow leaders – however meritorious and warranted – may have to be justified on grounds other than its deterrent impact on potential future rebel leaders.

Different considerations apply in the case of Darfur. When it comes to the calculations of government officials, prosecution is a threat to something they already have – power

– and thus may have greater deterrent impact. If a credible threat of prosecution for future atrocities exists in the minds of a regime's leaders, then they have something tangible to lose and arguably will weigh that risk when deciding how to respond to a challenge to their authority. The successful prosecution of Sudanese officials responsible for the state's campaign of atrocities would send a powerful message around the world, and may go some way to preventing Darfur-like situations in the future. We know that the Milosevic, Taylor and Habré examples have resonated among leaders responsible for atrocities elsewhere. Also, it is certain that any Darfur peace deal that left the Khartoum regime in power would not prevent its restarting the conflict if and when it suited its purposes – as it is currently doing in central Sudan in breach of the CPA. Hence, when dealing with Khartoum, the likely outcome is no peace and no justice.

Conclusion

An assessment of the ICC's impact on the Uganda conflict, and of considerations arising from other conflicts such as that in Darfur, cannot provide a straightforward answer to the question of how best to resolve competing justice and peace goals. On the one hand, ICC prosecution has, arguably, been successful where other attempts have failed in forcing Kony to the negotiating table, and providing him with incentives to explore seriously the option of a peace agreement. Yet, as the peace talks progress, it is clear that the ICC remains a very real obstacle to achieving an end to the conflict.

Much can be done to accommodate the need for peace with the demands of justice, particularly through the mechanism of Uganda's own justice system. In the end, however, difficult choices have to be made about how to balance the need for peace with the acute importance of accountability, deterrence and the strengthening of the institution of the ICC.

These are not easy decisions, and often the choices that have to be made are distasteful – but we don't do any favours to the causes of peace or justice by pretending that such decisions don't have to be made when it comes to ending a conflict. Let's just hope that we make the right choices when we have the option.

- 1 The ICC Prosecutor also opened an investigation in the Central African Republic on 22 May 2007. See, Office of the Prosecutor, "Background note on the opening by the Prosecutor of an investigation in CAR", Media Release by the Office of the Prosecutor, The Hague: ICC, 22 May 2007.
- 2 T. Allen, "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention", London: Crisis States Research Centre, Development Studies Institute, London School of Economics, 2005; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "A Ugandan Tragedy", 10 November 2004.

- 3 Republic of Uganda, Ministry of Health, "Health and mortality survey among internally persons in Gulu, Kitgum and Pader districts", July 2005, available at: www.who.int/hac/crises/uga/sitreps/Ugandamortsurvey.pdf.
- 4 For example, J. Volqvartz, "ICC Under Fire Over Uganda Probe", CNN.com, 23 February 2005; K. Southwick, "When Peace and Justice Clash", *International Herald Tribune*, 14 October 2005; "Not a Crime to Talk: Give Peace a Chance in Northern Uganda", joint statement by Refugee Law Center and Human Rights Focus (HURIFO) on the Juba Peace Talks, July 2006; H. Cobban, "Uganda: When International Justice and Internal Peace are at Odds", *Christian Science Monitor*, 24 August 2006; Z. Lomo, "Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective", Kampala: Refugee Law Project, August 2006.
- 5 M. Osman, "Sudan President: No Handover of Citizens", *Washington Post*, 3 March 2007.

3. Justice at Juba: International Obligations and Local Demands in Northern Uganda

Michael Otim and Marieke Wierda

Introduction

The current peace talks between the Government of Uganda and the Lord's Resistance Army (LRA) offer the best chance to date for ending a conflict that has ravaged northern Uganda for over two decades. Hosted in Juba by the Government of Southern Sudan and with international support, the negotiations have made significant progress since the signing of a Cessation of Hostilities Agreement in August 2006.¹ Headway at Juba has led to improved security in northern Uganda and the gradual return of some internally displaced persons (IDPs) to their homesteads.

The process, however, has been fraught and fragile. Foremost among the intricate issues in the negotiations has been how to reach agreement about accountability and reconciliation, given the International Criminal Court's (ICC) issuance of arrest warrants for the leaders of the LRA. The LRA leadership has demanded that ICC proceedings be halted as a precondition to a final settlement – thus prompting claims that the Court's warrants have become a hurdle to the resolution of a devastating conflict. Fierce debate has surrounded the impact of the ICC on the Juba process and its role in addressing impunity for crimes in northern Uganda. Reaching an agreement that is acceptable to the warring parties; that has legitimacy in the eyes of northern Ugandans; and that sets steps in motion that prove to be consistent with the provisions of the ICC's Rome Statute has been, and continues to be, a daunting task.

At the time of writing, the viability of the Juba process is uncertain, but it remains important to recognise the innovations of the process to date. In this essay we argue that, regardless of the ultimate fate of the talks, the early treatment of accountability and reconciliation dilemmas at Juba has set new standards in terms of efforts to meld local demands and international legal obligations. These are new standards of substance – as reflected in the June 2007 Agreement on Accountability and Reconciliation and its Annexure of 19 February 2008 – and of process, in terms of soliciting the views of affected populations.

Before Juba: amnesty, traditional justice and the International Criminal Court

The Juba peace talks occur against a backdrop of enormous urgency to resolve the northern Ugandan conflict. The LRA, under the leadership of Joseph Kony, has waged a war characterised by forced recruitment and the massacre and mutilation of civilians. The humanitarian disaster that has resulted from the conflict is acute. In the IDP camps in the north up to 1.5 million people have been crowded in dismal conditions. Rates of morbidity and mortality are among the worst in the world. In addition to the threat of sporadic attacks

by the LRA, many northern Ugandans have suffered from the government's policy of neglect towards the north. Much of the population feels profoundly betrayed by the lack of government protection from abuses by the Ugandan army that was meant to protect them. Many in the north have also suspected that the government has for many years refrained from prioritising a resolution to the conflict, preferring it as a tool to subjugate the northern population. Some progress on peace talks was made under Government Minister Betty Bigombe but her latest initiative stalled in 2005.

The urgency of finding a solution to the conflict led to various local initiatives that preceded the Juba talks. One important measure – initiated by those directly affected by the conflict – has been the Amnesty Act of 2000. The Act introduced a simple, non-onerous procedure by which people previously involved in rebellion could renounce violence and return to the community. Combatants throughout Uganda have used the Amnesty Act, and under its provisions around 14,000 have disarmed, including approximately 8000 from the LRA.² However, the Amnesty Act has not resulted in comprehensive LRA defections. Another prominent local initiative that has come to shape the Juba talks has been the revival, in various northern areas, of dormant traditional ceremonies for conflict resolution and reconciliation

In addition to renewed focus on traditional justice, the Juba talks have been profoundly shaped by the intervention of the ICC in northern Uganda. Many Ugandans first became familiar with the Court when news broke in January 2004 that President Yoweri Museveni and Luis Moreno Ocampo, the Prosecutor of the ICC, had appeared in a joint press conference in London, to announce that Uganda had referred to the Court the conflict situation in the north. The ICC opened formal investigations into the situation in northern Uganda in January 2005 – an investigation that could, in principle, encompass both the crimes of the LRA and the Ugandan People's Defence Force (UPDF). In October 2005, the ICC issued arrest warrants against five LRA leaders.³

On the face of it, Uganda should have been an easy first case for the ICC. Investigations of the LRA, a relatively small military movement with tight command structures, proved manageable and achieved quick results in terms of arrest warrants. The crimes were abhorrent and the government cooperative. However, the ICC's intervention caused a storm of controversy. Subsequent to the Prosecutor's joint appearance with President Museveni, many felt that the ICC was associating too closely with one party to the conflict, thus undermining perceptions of the Court's impartiality. It was also believed that arrest warrants constituted support for a military rather than a peaceful solution to the conflict. The absence of investigation of the UPDF has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection. Furthermore, a strong line of reasoning emerged that the ICC represents a Western form of retributive justice that is rejected by the people of northern Uganda as culturally inappropriate. Religious and traditional leaders argued that their form of indigenous justice – one that emphasises forgiveness, reconciliation and reintegration over trial and punishment – should take priority.⁴

Justice at Juba

This opposition to the ICC was closely related to disputes over the Court's impact on the fledgling Juba process. The most significant factor giving impetus to the talks that began

in July 2006 is the changed political dynamics in Southern Sudan following the signature of Sudan's Comprehensive Peace Agreement (CPA). The CPA forced the Sudanese army to withdraw from much of Southern Sudan, complicating the Sudanese government's support to the LRA. The LRA leadership itself relocated to Garamba National Park in the DRC. However, supporters and critics of the ICC both tend to agree that the Court's warrants also played a role in pressuring the LRA to the negotiating table, both in terms of giving the LRA an incentive to negotiate, to try to eliminate the indictments, and disrupting its supply lines as other actors became reluctant to deal with them, thus calling into question its long-term viability.

From the beginning, the LRA combatant leaders have demanded the 'withdrawal' of ICC arrest warrants as a precondition to their approving a final agreement (an immediate withdrawal of the arrest warrants as such is not legally possible). In turn, the government position has not always been consistent, particularly in the early days of the peace process, when President Museveni still spoke of a blanket amnesty. With time, however, the government assumed the position that it was willing to approach the ICC with a request to lift the arrest warrants – but only if a final peace agreement was signed first.

The prominence of the ICC's arrest warrants in public debate about the Juba process, and the Bigombe process before it, fuelled claims that the Court was jeopardising prospects for peace. Advocacy on this issue was strong and remains best encapsulated in the title of a paper written by the Refugee Law Project in 2005, *Peace First, Justice Later*.⁵ However, the main impact (and a positive one) of the ICC arrest warrants on the talks has been an early recognition by both sides that the issue of accountability must be addressed as a central part of the negotiations (unlike in numerous other peace agreements where accountability was taken off the table at an early stage, such as while negotiating the CPA in Sudan). The debate in northern Uganda has not been whether to address accountability, but rather *how* it should be done.

Both parties to the conflict issued early position papers on the balance to be found between accountability and reconciliation. The first government papers on this issue (which was designated Agenda Item 3), proposed ways in which members of the LRA responsible for atrocities could be reintegrated into society, including thorough the *mato oput* ceremony and amnesty. Conversely, the LRA emphasised a need for recognition of the root causes of the conflict. The rebels also stressed the need for the various actors (not least the government) to accept responsibility for causing the conflict, expressed through mechanisms such as traditional justice, a truth and reconciliation commission, and compensation. There was some overlap between these positions. However, throughout these discussions the ICC continued to emphasise Uganda's international legal obligations, arguing that any peace deal should respect the provisions in the Rome Statute.

Debates erupted internationally about possible ways to halt the ICC proceedings. Discussed options included an intervention by the UN Security Council (under Article 16 of the Rome Statute) to freeze the investigation for one year (renewable).⁶ Alternatively, the Prosecutor himself can approach the Pre-Trial Chamber to argue that continuing the investigation or prosecution is no longer in 'the interests of justice' under Article 53 of the Statute. Further still, Uganda can seek to exercise its own jurisdiction pursuant to the regime of complementarity

laid out in Articles 17-19 of the Rome Statute. Here the Statute specifies that if a State Party chooses to investigate or prosecute a case domestically, the Court will not have jurisdiction, unless the State itself is 'unwilling or unable genuinely' to investigate or prosecute.

Each of these options faced obstacles. For instance, northern Uganda has not previously been on the Security Council's agenda. Some have questioned whether the Security Council should really get involved in the conflict for the first time with the sole purpose of arranging the LRA leaders' escape from justice. Likewise, could the Prosecutor be expected to argue, in his very first case, that it was not in the interests of justice to proceed against the LRA? The Prosecutor himself issued an internal policy paper that stated that the interests of justice are not synonymous with those of peace.⁷ Throughout this debate, the ICC risked being seen as a spoiler to the peace process.

Achieving agreement on reconciliation and accountability

Amid these tensions, in early summer 2007, delegates at Juba faced the question of Agenda Item 3. The challenges were formidable. On 31 May 2007, the LRA tabled a new position paper that accused the government of crimes during the conflict and reiterated the demand for traditional justice and a truth commission. The government delegation remained silent. However, the parties had agreed to a one-day workshop on all legal issues pertaining to the conclusion of Agenda Item 3. This included traditional justice; international legal standards and considerations; and relevant issues of national law. While the discussions following the workshop were long and difficult, they produced several conclusions that paved the way for the Preliminary Agreement on Accountability and Reconciliation.

Delegates drew the important conclusion that the traditional justice systems under discussion (including those from Acholi, Lango and Teso) were more appropriately viewed *in parallel* to formal justice, rather than as an alternative to it. They also concluded that traditional justice principles should play an important role in the aftermath of the conflict but that the *mechanics* still needed to be outlined. Clarification, they noted, was necessary of how intra-tribal ceremonies would deal with inter-tribal crimes. Delegates had to address how to proceed when the perpetrator is unknown and how to apply traditional ceremonies when the crimes at issue are sexual or abduction-related, rather than killings. A further concern was the actual capacity of traditional structures to take on massively increased and transformed duties. Delegates also grappled with difficulties over the feasibility of relying on voluntary confessions and uncertainties over the financing of reparations.

Besides agreements about traditional justice, delegates concurred that there should be a *national* approach to accountability and reconciliation and that this would require the government to challenge the jurisdiction of the ICC under the Rome Statute. The delegates noted Uganda's prior experiences of addressing questions of transitional justice.⁸ They also noted current legal tools of relevance such as the Amnesty Act of 2000 (as amended); the Amnesty Commission; the Uganda Human Rights Commission; and the Ugandan Constitution. They suggested that amnesty could remain useful for dealing with a large number of persons who may return under a peace agreement. The parties agreed that

crimes under international law, such as crimes against humanity, were not fully reflected in Ugandan law. Therefore, new legislation would be needed to ensure that the exercise of national criminal justice met complementarity standards under the Rome Statute.

These discussions paved the way for an Agreement on Agenda Item 3, signed at Juba on 29 June 2007.⁹ Most importantly, the Agreement establishes a general national framework and approach as a foundation for further discussions about specific accountability and reconciliation mechanisms. It states specifically that 'formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict'. For non-state actors (in this case LRA personnel not facing ICC warrants), the agreement specifies that an 'alternative regime of penalties' will be introduced, and that these shall take into account the gravity of the crimes but also the need for reconciliation. In this respect, the Agreement resembles Colombia's 2005 law on Justice and Peace.

The Agreement refers to several other principles. These include the need to carry out an 'analysis of the conflict' and its root causes as well as the need for reparations for victims and for due process and effective legal representation for the accused. Victim participation in accountability processes and the special needs of women and children also feature in the Agreement. Traditional justice mechanisms are recognised as 'a central part of the framework of accountability and reconciliation.' Finally, the Agreement requires the government to undertake to 'address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M'. The government and the LRA agreed to put further issues relating to the mechanisms to a public consultation.

After a period of public consultations described below, the Government and LRA signed an Annexure to the Agreement on 19 February 2008. The Annexure specifies the mechanisms that will be established for transitional justice in Uganda. A special division of the High Court will be created to try persons responsible for serious crimes, in particular those responsible for widespread or systematic attacks against civilians or grave breaches of the Geneva Conventions. Furthermore, a 'Commission of inquiry into the past and related events' will be established, with functions similar to those of a truth commission. The Annexure also states that the Government will take responsibility for reparations and that 'traditional justice will play a central part of the alternative justice and reconciliation framework referred to in the Agreement.' Much speculation remains on what may be envisioned in terms of sentencing, an issue on which the Annexure is conspicuously silent. Questions also remain over whether all provisions will apply equally to both the Government and the LRA.

International human rights groups have been critical of the Annexure. For instance, on 20 February 2008, Amnesty International stated that 'It is not acceptable for the Ugandan government and the LRA to make a deal that circumvents international law,' and that Uganda would still need to hand senior LRA leaders over to the ICC.¹⁰ Similarly, the International Federation for Human Rights (FIDH) stated on 25 February 2008, that 'Uganda is . . . under an absolute obligation to cooperate with the ICC and to hand over the LRA leaders'.¹¹

These positions seem to suggest that a challenge by Uganda of the ICC indictments on the grounds of complementarity is not possible or unlikely to succeed as the Court has already investigated the crimes concerned. However, it is important to remember that Uganda originally referred the situation concerning the LRA to the Court not because it was unable to try the LRA but because it was unable to arrest them. If that factual situation should reverse, the terms of the Rome Statute make it possible for Uganda to challenge admissibility without first having to surrender LRA leaders to The Hague. Of course, Uganda would have to demonstrate ability and willingness to genuinely investigate and prosecute.

The Agreement and Annexure are potentially of great significance in allowing for peace without ignoring or rejecting the importance of Uganda's international obligations. A national solution and comprehensive approach to justice, if properly implemented, could have far reaching implications for Uganda's future. Of course, implementation still depends entirely on the successful conclusion of the Juba talks and on post-talks follow-up. Nonetheless, the Agreement and Annexure represent an important step forward, and is more comprehensive on justice provisions than most other peace agreements.

The views of victims

Another important development throughout the Juba process has been the consultation of affected populations. The talks themselves have been non-inclusive and many stakeholders have been absent from the table. However, as a formal part of the peace process, from September to December 2007, the government and the LRA toured northern Uganda to gather views in affected areas. Select meetings with particular stakeholders, such as judges and lawyers, were also planned in Kampala. While there may have been flaws in the implementation of the consultations¹², the concept of consulting affected populations and other stakeholders as a deliberate attempt to overcome some of Juba's legitimacy problems was a valuable one.

The views of local populations have also been gathered through surveys and research projects. Key studies include those by the UN Office of the High Commissioner for Human Rights¹³ and joint efforts of the Gulu District NGO Forum and the Liu Institute's Justice and Reconciliation Project.¹⁴ A prior survey, called *Forgotten Voices*, was conducted by Berkeley-Tulane and ICTJ in 2005.¹⁵ This survey was repeated in 2007 in a report entitled *When the War Ends*.¹⁶ These studies have shown the complexity of victims' views on issues of peace and justice, as well as how these views can change over time. For instance, when surveyed in 2005, a majority of respondents (66%) said they favoured 'hard options' in dealing with LRA leaders, including trials, punishment or imprisonment. Only 22% preferred options such as forgiveness, reconciliation and reintegration. In 2007, this statistic had reversed, with 54% preferring soft options and 41% preferring hard options. In 2005, knowledge of the ICC was at 27% of all respondents, compared to 60% in 2007.

Besides revealing the varied and changeable nature of local opinions, the research (and consultations) assisted to fill out the picture of what transitional justice in northern Uganda should include, beyond what has been discussed at Juba. For instance, affected populations

have clearly indicated that the needs of victims should feature more centrally in the process. In both the OHCHR and Berkeley-Tulane-ICTJ surveys, a high number of respondents indicated that they favour a truth commission for Uganda and would also like a greater focus on reparations. These perspectives are respected in the recent Annexure.

Conclusion

It is still unclear whether Juba will succeed. While there were notable successes in February, including the signature of a permanent ceasefire, recent developments, including in-fighting within the LRA and the death of Vincent Otti, defections, movements to the Central African Republic, attacks in South Sudan and continued threats of military action by the Congolese army are all factors that have put strain on the process.

Nonetheless, it is not premature to conclude that, to date, pressure from the ICC arrest warrants helped bring the parties to the negotiating table and that the warrants have also spurred debates about accountability. In terms of the overall Juba talks, there has been important progress on two levels. First, an Agreement has been concluded that contains many crucial elements towards resolving the impasse over the ICC arrest warrants. Second, an important precedent has been set in terms of consultation of affected populations as part of the peace process. The conflict parties have increasingly recognised the need for multiple mechanisms to bring about accountability and reconciliation, in which formal and traditional mechanisms are parallel and complementary rather than mutually exclusive. In these respects, much can be learnt from experiences in Uganda, regardless of whether Juba itself succeeds or fails.

- 1 Dr. Riek Machar, the Vice-President of Southern Sudan, has mediated the talks and Joaquim Chissano, former President of Mozambique, has played a prominent role in his capacity as UN Special Envoy. Several African governments are formally monitoring the process, and a number of international donor countries are contributing to the Juba Initiative Fund, originally established by former UN Humanitarian chief, Jan Egeland.
- 2 The remainder come primarily from various rebel groups in West Nile region.
- 3 Since the warrants were issued, two of the five suspects, Raska Lukwiya and Vincent Otti, have been killed.
- 4 See, for instance, Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi, "Roco Wat I Acoli/ Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reconciliation", September 2005.
- 5 Available at: www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf
- 6 This course of action allows for a 'third country option' with asylum for the LRA.
- 7 Office of the Prosecutor, internal policy paper on "Interests of Justice", consulted with State Parties and NGOs, The Hague: ICC, 2006.

- 8 Such experience includes the commissions of inquiry instituted by Idi Amin Dada dealing with disappearances; the Oder Commission which scrutinised the period from independence to 1986; and the Amnesty law of 1987 and penal code (which excluded genocide, war crimes and rape).
- 9 Full text of the Agreement can be found at: www.fides.org/eng/documents/uganda_agreement_290607.doc.
- 10 See http://www.amnesty.org.uk/news_details.asp?NewsID=17665
- 11 See <http://www.fidh.org/spip.php?article5256>
- 12 For instance, some observers have remarked that the format of some of the consultations held by the LRA could not have evoked voluntary responses to the questions posed.
- 13 See, United Nations Office of the High Commissioner for Human Rights, "Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda", August 2007.
- 14 See, Justice and Reconciliation Project, "The Cooling of Hearts: Community Truth-Telling in Acholiland", July 2007. Other examples include Oxfam, "The Building Blocks of Sustainable Peace: The Views of Internally Displaced People in Northern Uganda", Oxfam Briefing Paper, September 2007; and Hurifo, "Fostering the Transition in Acholiland: From War to Peace, from Camps to Home", September 2007.
- 15 P. Pham, P. Vinck, M. Wierda, E. Stover, and A. di Giovanni, "Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda", International Center for Transitional Justice and Human Rights Center, University of California, Berkeley, July 2005.
- 16 P. Pham, P. Vinck, E. Stover, A. Moss, M. Wierda and R. Bailey, "When the War Ends: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda", ICTJ/ Tulane/Berkeley, December 2007.

4. Darfur, the Court and Khartoum: The Politics of State Non-Cooperation

Alex de Waal

Introduction

On 31 March 2005, the United Nations Security Council (UNSC) voted to refer the Darfur situation to the International Criminal Court (ICC), the first ever such referral. The US abstained, allowing Resolution 1593 to pass without veto. This was a signal triumph in itself. However, it has proved much more difficult to obtain sufficient cooperation from the Sudanese government to allow investigations to proceed and prosecutions to be mounted. In 2007, the ICC indicted two individuals, one of them a serving government minister. At the time of writing, the prospects for either of the two being surrendered to The Hague are remote.

This essay argues that the underlying reason for this defiantly rejectionist stand is a near-complete collapse in confidence between Khartoum and major western governments, principally the US. In turn this arises from the range of instruments used by the US and UN to pressure and punish Sudan over the Darfur crisis. In Khartoum, the ICC is seen as one such instrument of pressure and punishment, rather than an independent body. The ICC's cautious step-by-step strategy has been influenced by the Prosecutor's accurate perception of this. Any potential or actual synergies or conflicts of interest between the prosecution of those responsible for egregious human rights violations and the pursuit of other goals (peace, reconciliation, peacekeeping, and humanitarian activities) have to be seen in the context of this overall confrontation and the poisonous atmosphere it has generated.

The ICC's investigations

Darfur's war gained international attention in February 2003 when a formerly little-known rebel group, newly-renamed the Sudan Liberation Army (SLA), launched military attacks on garrisons in central Darfur. The SLA was joined quickly by the Justice and Equality Movement, a small and more cohesive group with its origins among dissenters from Sudan's Islamist movement. The government responded to rebel attacks with a ferocious counter-insurgency, aiming to break the back of the rebellion by destroying the insurgents' civilian support base. The Janjaweed militia formed the vanguard, operating under the coordination of military intelligence along with the air force and regular army units.

In a series of wide-ranging offensives in 2003 and 2004, the military threat posed by the rebellion was halted, with immense violence inflicted on the civilian population. Tens of thousands of civilians were killed, many more died from hunger and disease, and more than two million were displaced. Atrocities included widespread rape and the wholesale burning and looting of villages and poisoning wells. Since 2004, over one third of Darfur's

population has been living in displaced camps, kept alive in large part by international relief. The Sudanese government has placed tight controls on humanitarian activity.

Partly due to sustained public advocacy, US Secretary of State Colin Powell declared in September 2004 that the atrocities in Darfur constituted 'genocide'. No other government followed suit, but the UNSC set up an International Commission of Inquiry into Darfur (ICID). While the ICID report did not deem that the violations amounted to genocide, it did conclude that crimes equally heinous had been committed. A sealed list of 51 names of individuals against whom evidence existed, sufficient for them to be of interest to a criminal investigation, was submitted to the UN Secretary General. The list included Sudanese army officers, militia commanders, rebel commanders and foreign military officers. Twelve were reportedly senior figures in the central government. Having initially sought to prevent the UNSC using the ICID report to refer the Darfur situation to the ICC, the US administration agreed to abstain from the vote, thereby allowing the passage of UNSC Resolution 1593. This Resolution, passed in March 2005, provided the mandate for the ICC to commence its Darfur investigations.

The Office of the Prosecutor (OTP) began its investigations in June 2005, but with only minimal cooperation from the Sudanese government, which declared it would now allow the ICC to open an office in Sudan. Khartoum instead established its own Special Criminal Court for Events in Darfur, arguing that domestic prosecutions would debar the ICC from playing any role, on the basis of its complementarity provision under Article 17 of the Rome Statute. Unsurprisingly, and consistently with Khartoum's own feeble internal investigation in parallel to the ICID, the Special Criminal Court has proven wholly ineffective.

Having analysed the pattern of crimes in Darfur, the ICC focused on the period between 2003 and 2004, when the majority of the violations were committed. While the Prosecutor studied the 51 names in the ICID's sealed envelope, it was necessary for the Court to compile its own evidence and draw its own conclusions. The OTP's investigations led it to determine that the Sudanese government was not pursuing the potential cases that the Prosecutor was considering and that the pursuit of these would-be cases would not damage the interests of justice and of victims.

The ICC's indictments and the response from Khartoum

On 27 April 2007, the ICC's Pre-Trial Chamber issued arrest warrants for two men. The first was Ahmed Mohamed Haroun, who had served as a Minister of State for the Interior during 2003 and 2004, and was especially involved in recruiting and deploying militia in Western Darfur. He allegedly had particular responsibility for recruiting, funding and arming the Janjaweed which committed a string of massacres and other violations, including widespread rape, in Wadi Saleh area.¹ Haroun is reported to be have been in the favour of the highest political leadership in Khartoum, which valued his readiness to carry out instructions loyally and to the full. At the time he was named, Haroun had been transferred to be Minister of State for Humanitarian Affairs, a position he has continued to hold.

The second individual named was Ali Mohamed Abdel Rahman 'Kushayb', a militia

leader who worked closely with Ahmed Haroun and is alleged to have been involved in many of the same crimes. He was in detention at the time, accused of other crimes by the Sudanese government, but without charge.

The Prosecutor said of the two that, '[a]cting together, they committed crimes against humanity and war crimes'.² The choice was politically astute. One is a significant figure in the hierarchy with command responsibility (though he has been charged in his individual capacity), but not someone sufficiently senior nor well-connected to the highest leadership that he could not be sacrificed politically. The other is a militia leader, already in detention, who could be thrown to the wolves with little political fallout. Moreover, the Prosecutor's first move – a request to the Sudanese government to surrender the individuals, not an arrest warrant as such – was a polite nod towards the sovereignty of Sudan. The two leaders were certainly nervous. The author shared a platform with Haroun at a conference in Cairo in January 2007, in which he was visibly tense at any mention of accountability for human rights abuses in general, and the ICC in particular.³

The OTP is also investigating crimes committed by rebels and former rebels, but has yet to issue any arrest warrants on the basis of the evidence obtained.

The Prosecutor's attempt to avoid any overt confrontation with Khartoum was rebuffed and the Pre-Trial Chamber subsequently issued arrest warrants against Haroun and Kushayb. The Sudanese government promptly hardened its stance of non-cooperation. Keeping Haroun in humanitarian affairs was a deliberate snub to the many western diplomats and humanitarian workers who were obliged to interact with him. He was even appointed to head an inquiry into allegations of human rights abuses in Darfur.

The indictments were criticised by some activists, and by the former head of the ICID, Antonio Cassese, on the grounds that the ICC should have been more ambitious – naming more names and going much higher, possibly even up to President Bashir. This would have been extraordinarily difficult, both empirically because of the relatively modest evidence that the ICC could collect given the non-cooperation of the Sudanese government, and politically, because it would have ensured Sudan's further obstruction of a raft of other internationally-sponsored initiatives for peace, peacekeeping and humanitarian activities. There was also muted criticism from some Southern Sudanese, who wanted to know why the comparable violations visited upon them were not of interest to the ICC, and why the 2005 Comprehensive Peace Agreement (CPA) was silent on accountability for these violations.

The ICC arrest warrants were followed in early June 2007 by a formal request to Sudan, neighbouring countries and much of the international community to apprehend and hand over the two individuals for investigation with a view to prosecution. The Sudanese government remained defiant.

Dilemmas for the ICC

The ICC has proceeded cautiously on Darfur, well aware both of the high expectations placed on it by the UNSC, a range of governments, and the international activist community, and of the constraints and possible perils that its investigations and prosecutions may

entail. Sudan's leaders simply do not believe that the ICC is independent of political pressures and they do not see the Court as distinct from other punitive measures imposed upon them. They see it as a threat. Along with the fact that the ICC was mandated by the UNSC, this makes the Darfur case distinct from those in Uganda and the DRC.

One of the Prosecutor's most important considerations is that his activities should not lead to Khartoum's retreating into self-imposed isolation and refusal to cooperate with the international community on a range of issues in Sudan, such as implementation of both the CPA (between the government and the Sudan People's Liberation Army) and the 2006 Darfur Peace Agreement (DPA). This would not only have blocked progress on the Darfur case⁴ but also caused friction between the ICC and western governments engaged in peace in Sudan.

At the time of the ICID report, less than two months after the signing of the CPA, there was an initial sense of shock and fear in Khartoum. Was this the international community's reward for the Sudanese government, after it had at last made all the concessions demanded of it to bring peace to the South? The Sudanese government's public statements at the time tried to emphasise the 'no genocide' finding of the ICID, but this did not succeed in concealing its deep fears. There was much speculation that all 51 individuals on the ICID's secret list would be rapidly indicted, and that these might include senior government ministers and military officers.

The slow pace of the ICC's investigations and the modest early naming of names have not laid those fears to rest. The Sudanese government's leaders know well that the prosecutions might begin at a lower level but track inexorably up the chain of command. They fear that the exposure of the culpability of members of Khartoum's security cabal could arise from the evidence obtained through pursuing the mid-level prosecutions. Such a trail of accountability was followed in the former Yugoslavia. They also fear that political pressures in western countries could lead to the same result. In addition, Sudan has its own history of judicial accountability for human rights violations – that which came after the 1964 and 1985 popular uprisings that overthrew military dictatorships.⁵

A second complication has been the worry that the prospect of UN soldiers' executing arrest warrants on behalf of the ICC might cause the Sudan government to object to the deployment of a UN peacekeeping force in Darfur. This concern was repeatedly voiced during 2006 as the international debate on the dispatch of UN troops to Darfur gained momentum. The ICC avowed that it had no interest in having UN troops arresting suspects and that it did not want to be an obstacle to a peacekeeping deployment. The OTP even quietly signalled to UNSC members that it would have no objection to a UNSC resolution that specifically excluded arresting criminals for extradition to the ICC. In the event, UNSC Resolution 1706 (31 August 2006) that mandated a UN force made no mention of the ICC in either direction. The judgement of UNSC members was that mentioning the ICC, even in a way that excluded it from the mandate, served no purpose as the Sudan government's fears would not be allayed anyway.

The fear that international humanitarian agencies and human rights organisations might collaborate with the ICC, by collecting evidence (especially the testimonies of victims) may

well have further poisoned relations between Khartoum and those agencies in Darfur. It is difficult to be sure whether this putative motivation had any additional impact on the Sudanese government's already well-honed skills of obstructing humanitarian and human rights work for a range of reasons, including fears of supporting armed rebels, supporting independent civil society organisations, and painting Sudan in an unfavourable light in the international media. However, the fact that Ahmed Haroun has a leading role in the regulation of humanitarian agencies is a *prima facie* case for supposing that his department will be particularly alert to any possible possession of incriminating evidence by these agencies.

At the peace talks between the government and the Darfur armed movements, mediated by the AU and conducted in Abuja up to May 2006, the issue of accountability for human rights abuses was taken off the table before the fifth round of talks, which convened in June 2005. The mediation team argued persuasively that, as the UN had already referred Darfur to the ICC, there was no need for the peace negotiations to deal with the issue.⁶ Any peace agreement for Darfur could neither provide amnesty (which would not be binding upon the ICC anyway) nor insist on accountability (as the task, at least in terms of international efforts, was already in hand). Hence, one potentially divisive issue at the peace talks was simply not raised in either the Declaration of Principles, the negotiations leading to the final text of the DPA, or indeed the post-DPA arguments over relaunching the peace process.

However, the ICC cast a shadow over the government's negotiations in Abuja and thereafter. For example, on several occasions, leaders of the armed movements and independent Darfurians have demanded that the Sudanese government issue an apology for the crimes committed in Darfur, as a prelude to offering compensation to the victims. When this suggestion has been raised to a high level in Khartoum (e.g. to Assistant President Nafie Ali Nafie and to President Bashir himself), it has been rejected on the grounds that an apology is an admission of culpability, and this is out of the question while the prospect of ICC indictments hangs over the government. The counter-argument to this – that the payment of compensation traditionally marks the closure of a dispute, with no further judicial recourse – has been scornfully rejected. Khartoum's most senior leaders simply do not believe that any gesture they make will be respected, let alone reciprocated.

The wider context

At the time of writing, the ICC has raised the prospect of judicial accountability for war crimes and crimes against humanity in Darfur, but to date has not delivered. The Sudan government is insistently rejectionist and while it remains so, progress cannot be made.

Have the ICC and the indictments been an obstacle to progress toward peace? As of late 2007, progress on international cooperation, peacekeeping and humanitarian action has been extremely modest, and on peacemaking has been almost nonexistent. But the ICC

cannot be identified as the major culprit for any of this. Rather, the ICC's investigations and indictments have occurred in a context of high-octane confrontation between Khartoum and Washington DC. Since the middle of 2006, any real communication between the two capitals has broken down, to be replaced by heated rhetorical exchanges.⁷ Underlying this is a calculation by Khartoum's rulers that Washington can never be trusted: whatever concession is made as part of a deal, the US will scorn it and simply demand more, until ultimate objectives such as forcible regime change or partition of the country are achieved. While this is not the official policy of the Republican administration, many in Khartoum believe that it is so. The fact that President George W. Bush announced unilateral US sanctions on Khartoum just two days after President Bashir verbally accepted a major American demand, the UN's 'heavy support package' to the AU, is seen as one such instance of bad faith. Meanwhile, the speeches of Democratic presidential aspirants appear to hark back to the Clinton administration's preference for seeing regime change enacted by the armed opposition.

Increasingly, western governments are hoping that China will help provide the necessary pressure to ensure that policy objectives in Sudan can be met. Implicit in the anticipated partnership with China is a strategy of engagement that prioritises stability and downgrades human rights principles.

It is possible that greater pressure on Sudan by western governments would lead to Khartoum's cooperation with the ICC. However, the multitude of policy objectives pursued by the US and European governments – many of them involving some form of coerced policy change, and all of them a higher priority than the ICC prosecutions – mean that it is improbable that western pressures will be targeted in this way. Much more likely is that Sudan's leaders resign themselves to pariah status, a condition which they endured and survived during the 1990s.

The Sudanese government perceives the UNSC to be an instrument of American and British power.⁸ The same UNSC that has repeatedly condemned Khartoum, imposed an arms embargo on Darfur, demanded that it disarm the Janjaweed and accept UN peacekeepers, has also referred Darfur to the ICC. Khartoum simply refuses to believe that the ICC is independent.

At the time of the CPA in 2005, when vice president Ali Osman Taha was ascendant in Khartoum's politics, it is possible that the terms of a compromise deal could have been reached that would have allowed for limited cooperation with the ICC, in the context of international support for the CPA and a settlement in Darfur. By 2007, Ali Osman had been eclipsed and Nafie, now the most powerful figure in the government next to the President, is determined on a policy of non-accommodation.

Conclusion

The war in Darfur has become highly politicised internationally, with a wide range of instruments being deployed by the UN and the US to put pressure on the Sudanese government and to promote an array of policy objectives. Attempts to ensure accountability

for war crimes and crimes against humanity through the ICC must be seen in the midst of this turbulence. While international jurists may identify the ICC as truly independent, it is not seen that way in Khartoum. The very range and intensity of pressures exerted on the Sudanese government have militated against the ICC being able to act with the autonomy to which it aspires. Meanwhile, ICC prosecutions are a low priority for western governments simultaneously concerned with keeping the CPA on track, resuming negotiations to resolve Darfur's war, sustaining an imperilled relief effort, deploying peacekeepers, and seeking Chinese cooperation to find solutions to all of the above. In addition, the current US administration has at best modest interest in ensuring the success of ICC prosecutions.

The ICC therefore has the worst of all worlds. While the current polarisation and estrangement between Sudan and the international community remains, it is unlikely that the ICC will be able to achieve the successful prosecution of even two individuals, against whom there is strong evidence that they are war criminals. Yet the focused, severe and sustained international pressure necessary to ensure Sudan's compliance with the ICC's demands will not be forthcoming, at least until the country's other crises are resolved. Faced with a complex and seemingly intractable conflict in a country whose serial dysfunction threatens to suck in its neighbours and consume ever-greater quantities of international energy and resources, the world's most powerful governments consider that justice is dispensable.

- 1 Ahmed Haroun had earlier served as the organiser of the Popular Defence Forces militia in South Kordofan during the 1990s, when there were intense attacks on the civilian population of the Nuba Mountains.
- 2 Office of the Prosecutor, "Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593", The Hague: ICC, 7 June 2007.
- 3 The conference was organised by the Cairo Institute for Human Rights Studies and funded by the Open Society Justice Initiative. The Sudanese government was asked to send a representative who could speak with authority about human rights in Darfur, and sent Ahmed Haroun – in a way, an appropriate choice.
- 4 It could also create complications for the LRA case, given the presence of the LRA leadership on Sudanese territory.
- 5 "Accountability for Human Rights Abuses" in A. H. Abdelsalam and A. de Waal (eds.), *The Phoenix State: Civil Society and the Future of Sudan*, Trenton, New Jersey: Red Sea Press, 2000.
- 6 D. Toga, "The African Union Mediation and the Darfur Peace Talks" in Alex de Waal (ed.), *War in Darfur and the Search for Peace*, Cambridge, MA: Harvard University Press, 2007.
- 7 The significant exception to this has been continuing counter-terrorism cooperation.
- 8 This is paradoxical given the US's opposition to the ICC, but Khartoum considers that Washington DC is perfidious and opportunistic.

5. Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda

Phil Clark¹

Introduction

The International Criminal Court's (ICC) current investigations and prosecutions in the Democratic Republic of Congo (DRC) and northern Uganda – the first in the Court's history – establish important precedents for its future operations. They also highlight a range of significant challenges the ICC faces in delivering international justice, especially in states experiencing ongoing conflict. Foremost among the questions confronting the ICC – a court with a global reach, but with a small staff and a limited budget – are where, whom and what it should investigate and prosecute. As it can't pursue all cases everywhere, how and where should it focus its efforts? What criteria should determine when the ICC intervenes and when it leaves situations and cases to domestic institutions?

These questions cut to the heart of the ultimate purpose of the ICC and international justice. This essay considers the policy and practice of ICC case selection in the DRC and northern Uganda. Given that these situations are the subject of the ICC's first investigations and prosecutions, the Court's approach in these instances indicates how it is beginning to interpret its role in addressing the gravest crimes around the world.

What emerges is a picture of a nascent global institution still defining its identity and purpose, endeavouring to secure the recognition and confidence of the states parties that back it, and sometimes making inconsistent decisions that undermine its legitimacy. This essay argues that the ICC needs a more systematic process of case selection, and a clearer view of how to balance contending legal and political concerns, if it is to fulfil its mandate and the hopes of its supporters and populations affected by violence.

Rules and policy of ICC case selection

The Rome Statute's principle of complementarity governs ICC decisions about which criminal situations to investigate and which cases to prosecute. The Office of the Prosecutor (OTP) has stated that complementarity should be viewed in a strict legal sense as a set of judicial procedures for determining the admissibility of cases and also as a broad policy, guiding the ICC's relations with states and domestic institutions and reinforcing respect for national sovereignty.² In broad policy terms, complementarity holds that states have the primary responsibility to prosecute serious crimes – genocide, war crimes and crimes against humanity³ – but where they fail to do so, the ICC will step in. Situations can be referred to the ICC in one of three ways: first, by a state party to

the Rome Statute; second, by the UN Security Council; third, at the instigation of the Prosecutor. In the third scenario, the Prosecutor must gain the authorisation of the Pre-Trial Chamber of the Court before launching investigations and must show that there are sufficient grounds to do so.

The more strictly legal interpretation of complementarity in the Rome Statute governs which specific cases the ICC *should not* investigate or prosecute. These comprise cases that states with jurisdiction over them are already investigating or prosecuting, displaying a genuine willingness and ability to do so; where the crimes in question are considered of insufficient gravity to concern the ICC; or where an investigation would not serve ‘the interests of justice’.⁴ The OTP is still defining exactly what ‘sufficient gravity’ and ‘the interests of justice’ entail. Its thinking on gravity currently appears more developed, with the Prosecutor recently outlining four main criteria for determining the gravity of crimes – their scale, nature, the manner of their commission, and their impact⁵ – although there has been little public elaboration on how these features may be assessed practically.

The Rome Statute emphasises which cases the ICC should not pursue because the drafters of the Statute in 1998 were primarily concerned with protecting against a ‘cowboy’ prosecutor who could ride roughshod over national sovereignty and thereby undermine domestic stability and, ultimately, the integrity of the Court. The drafters assumed that governments would be reluctant to surrender domestic jurisdiction to the ICC, wanting to show that they could investigate and prosecute serious cases themselves.⁶ Consequently, the Rome Statute provides little guidance to the ICC in handling instances when states voluntarily refer situations to the Court, as the DRC and Uganda have done.

Broad ICC prosecutorial strategy

The ICC is still developing its broad strategy for case selection, on the basis of the rules outlined in the Rome Statute and its policy of complementarity. However, three trends in the OTP’s approach have emerged so far. First, the OTP has indicated that it will focus on perpetrators who bear the greatest responsibility for crimes. This means that the OTP is likely to prosecute only government, military or militia leaders suspected of orchestrating or committing crimes under the ICC’s jurisdiction.⁷

The second trend concerns the OTP’s statement that it ‘will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.’⁸ Thus, the ICC will reportedly prosecute small numbers of high-level perpetrators, while encouraging domestic jurisdictions to help close any potential ‘impunity gap’ left by the ICC’s focus on a minority of suspects.

Third, the OTP has indicated that it will take a highly cautious approach to selecting which cases to investigate, acting only when it possesses enough evidence to provide strong prospects for a successful investigation. It is likely that the OTP will pursue cases only where states parties and other sources have already gathered substantial evidence

of alleged crimes, thus hastening the OTP's investigations. It is also likely that the ICC will take 'considered decisions' that will entail selecting cases that do not significantly destabilise the social and political situations in the states concerned.⁹

The situations in the DRC and Uganda show how the ICC has implemented this prosecutorial strategy so far and the major dilemmas it has encountered. In particular, these developments highlight the immense difficulties the ICC has faced in balancing the law and politics of its case selection. The ICC is caught between an idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute, and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy. This article highlights the pitfalls of the ICC's ultimately pragmatic approach to case selection so far, in particular its avoidance of prosecuting Congolese or Ugandan government officials. However, an overly idealistic policy, in which the Court would begin by prosecuting government cases, could risk its own field operations and jeopardise general peace and stability. Many of the ICC's challenges so far reflect the inherent difficulties of delivering international justice amid ongoing conflict and political upheaval. Some of the Court's challenges, though, result from flawed or inconsistent case selection policy.

Democratic Republic of Congo

The Congolese situation is of historic significance to the ICC, providing it with its first ever suspects in custody, Thomas Lubanga, the leader of the rebel *Union des Patriotes Congolais* (UPC), Germain Katanga, commander of the *Force de Résistance Patriotique en Ituri* (FRPI), and Mathieu Ngudjolo, former leader of the *Front des Nationalistes et des Intégrationnistes* (FNI). An invitation from Prosecutor Ocampo in a speech to the Assembly of States Parties to the Rome Statute in September 2003 increased international pressure on the DRC to refer cases of mass crimes to the ICC. In response, Congolese President Joseph Kabila referred the situation in the DRC to the Prosecutor in March 2004. Highlighting the complex political and military environment in which the ICC would operate, the Prosecutor's announcement of the opening of investigations in June 2004 coincided with fierce fighting between the Congolese government and rebels in the province of South Kivu.

Within the DRC, the ICC focused its attention on Ituri province because it deemed the atrocities committed there to be the gravest in the Congolese conflict. The Court's investigations were greatly boosted by the government's arrest, with the assistance of the United Nations Mission in the Democratic Republic of Congo (known by its French acronym, MONUC), of three Ituri militia leaders: Thomas Lubanga, Floribert Ndjabu and Germain Katanga. All three leaders were charged with war crimes and crimes against humanity, including involvement in the murder in February 2005 of nine Bangladeshi peacekeepers. Following negotiations with Congolese political and judicial officials, the ICC secured the arrest of Lubanga, who was transferred from Kinshasa to The Hague on 17 March 2006, followed by Katanga on 17 October 2007. Ngudjolo, who had been appointed a colonel in the Congolese national army in October 2006, was arrested by Congolese authorities during military training in Kinshasa and transported to The Hague

on 7 February 2008. The ICC has charged Lubanga with three counts of war crimes: enlisting children under the age of 15 years; conscripting them to the armed forces of the UPC and using them to participate actively in hostilities. Katanga and Ngudjolo have both been charged with six counts of war crimes and three of crimes against humanity, including murder, sexual slavery and the conscription of children.

The choice of Lubanga, Katanga and Ngudjolo as the ICC's first prosecuted suspects in the DRC and the cases against them manifest four main problems. First, while there is little doubt that atrocities committed in Ituri have been among the gravest in the DRC, immense political caution characterised the ICC's strategy, raising questions about the validity of its approach. Of the various conflicts in the DRC, that in Ituri is the most isolated from the political arena in Kinshasa. In particular, there is less clear evidence to connect President Kabila to atrocities committed in Ituri, although it is suspected that he has previously supported various rebel groups in the province, including Germain Katanga's FRPI. This differs from violence in other provinces, particularly North and South Kivu and Katanga, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes. Therefore, investigations and prosecutions in Ituri display the least capacity to destabilise the current government.

This was a crucial consideration for the ICC, as it needed to maintain good relations with Kinshasa to ensure the security of ICC investigators and other personnel working in the volatile eastern provinces. MONUC's major peacekeeping presence in Ituri – the largest in the country – was vital in these ICC security calculations. The ICC also wanted to avoid implicating government officials in the lead-up to Congo's first post-independence elections, held in July 2006. Foreign donor pressure on the ICC to avoid causing political instability was severe, as the international community (principally the UN and the European Union) poured US\$500m. towards the elections, the most expensive in the UN's history. While it is important for the ICC to avoid, wherever possible, destabilising fragile political situations, the Court faces a serious dilemma when many of the leaders capable of creating instability are also responsible for many of the gravest crimes. This sends a message to major perpetrators that their senior political or military status will insulate them from prosecution. For the Congolese population, this spells continued impunity for the leaders most responsible for the immense harm they have suffered.

Second, problems stem from the ICC's judicial caution in the DRC situation. Ituri provided the ICC with a simpler legal task than other provinces. Of the conflict-affected provinces of the DRC, Ituri has the best-functioning local judiciary, which has already shown adeptness at investigating serious crimes, including those committed by Lubanga, Katanga and Ngudjolo. It is therefore unclear whether the ICC can adequately justify its involvement in Ituri, given the capacity of domestic institutions to investigate and prosecute major crimes. Since July 2003, the EU's Ituri-focused investment of more than US\$40m. towards reforming the Congolese judiciary has seen considerable progress in local capacity.¹⁰ The OTP was given a head-start by the fact that when it opened its investigations into the Lubanga and Katanga cases, the major militia leaders were already in custody and significant evidence of crimes had already been gathered by the local civilian and military courts, working closely with MONUC. This has led observers to question the validity of the ICC's strategy in Ituri, asking why a global court has focused its energies where the

judicial task is more straightforward due to substantial local capacity, while mass atrocities continue in provinces where judicial resources are severely lacking. 'Ituri is easy for the ICC,' one foreign diplomat in Kinshasa told the author. 'MONUC have all the information on cases there. The dossiers are ready to go. Did we really fight all those political and legal battles to create the ICC only to have it try the easiest cases?'¹¹ Prosecutor Ocampo has said that Ituri represents only 'the beginning not the end'¹² of the ICC's work in the DRC and that the ICC may extend its investigations to other provinces in the future. Recent statements by the Prosecutor suggest the Court will open investigations in the Kivus during 2008, potentially focusing on alleged crimes committed by Laurent Nkunda's Tutsi forces or Hutu militias such as the *Forces Démocratiques de la Libération du Rwanda*.¹³

Third, questions have been raised about the narrow geographical approach the ICC has taken so far in the Lubanga case. The OTP has resisted investigating the wider dimensions of Lubanga's crimes, notably the alleged training and financing of Lubanga's UPC by the Ugandan and Rwandan governments. Such investigations could implicate key figures in Kampala and Kigali, including Salim Saleh, Ugandan President Yoweri Museveni's half-brother and a former Ugandan People's Defence Force (UPDF) commander. Despite the regional issues highlighted by the Lubanga case, the Prosecutor has indicated that he does not wish to widen its scope.¹⁴ Voices within the ICC itself have criticised this. Following Lubanga's confirmation hearing, the Pre-Trial Chamber's 29 January 2007 ruling included an unprecedented statement that the Prosecutor's charges against Lubanga were insufficient as they failed to recognise the 'international' nature of the Ituri conflict, implying the role of Uganda and Rwanda. The Prosecutor appealed to the Pre-Trial Chamber, requesting that references to crimes in the 'international' conflict dimension be removed from the charges against Lubanga, as the OTP's evidence related only to crimes committed in the 'internal' conflict.¹⁵

Fourth, the OTP has brought only minimal charges against Lubanga, although it has been more expansive in charging Katanga and Ngudjolo. In accusing Lubanga of three counts of war crimes involving children, while leaving out other serious crimes in which Lubanga has been implicated, the OTP has delivered on its promise to pursue expeditious justice. This strategy suggests that the OTP wishes to run a rapid, efficient trial of Lubanga and would rather convict him of lesser war crimes more quickly than charge him with serious crimes and risk a protracted trial, such as that of Slobodan Milosevic at the International Criminal Tribunal for the former Yugoslavia, which dragged on for years, for no judicial result.¹⁶ This highlights a major tension in international justice, between the need to conduct expeditious investigations and prosecutions and the need to pursue representative cases involving those most responsible for crimes.

Overall, it is clear that self-serving pragmatism rather than pragmatism geared to the needs of the Congolese population has been the primary consideration in the ICC's case selection to date in the DRC. In the Lubanga, Katanga and Ngudjolo cases, domestic authorities and MONUC had done most of the hard work of capturing the suspects and investigating their crimes. The Lubanga case, while addressing grave crimes, does not address the gravest of Lubanga's crimes for fear these would greatly complicate the judicial process. The Lubanga, Katanga and Ngudjolo cases also represent the ICC's attempts to maintain good working relations with the Congolese government in order to facilitate ICC investigations during ongoing conflict and to maintain the support of the Court's principal donors in the context

of the Congolese elections and their direct aftermath. This highlights a fundamental dilemma for the ICC, which often operates in fraught political and military environments. However, the ICC's responses to this dilemma so far in the DRC have significantly undermined the Court's legitimacy among affected populations, which had hoped it would finally hold accountable those most responsible for mass atrocities.

Northern Uganda

President Museveni referred the situation in northern Uganda to the ICC Prosecutor in December 2003, the first ever state referral to the ICC. In its communication, the Ugandan government underscored crimes committed by the Lord's Resistance Army (LRA), but Prosecutor Ocampo notified President Museveni that the ICC would interpret the referral as concerning all crimes under the Rome Statute committed in northern Uganda, leaving open the possibility of investigating alleged atrocities by government forces.

The ICC's decision to open investigations in the Uganda situation was based on the gravity of the crimes reported and the inability of the Ugandan authorities to capture and arrest the LRA commanders. This differs from the DRC case, in which the referral to the ICC was based on the inability of the Congolese judiciary to address mass crimes. Highlighting the volatile environment in which the ICC would operate in Uganda, one week after the ICC announced its opening of investigations, the LRA attacked an IDP camp at Abia in Lira district, killing 50 civilians. In August 2004, the Prosecutor stated that he expected to commence the trial of LRA suspects within six months and that this would help bring about a swift end to the conflict in northern Uganda.¹⁷

In October 2005, the ICC issued arrest warrants for five LRA commanders: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.¹⁸ The indictments against the five commanders comprised a range of alleged war crimes and crimes against humanity during LRA attacks between July 2002 and July 2004. Announcing the issuance of the arrest warrants, Prosecutor Ocampo justified the selection of LRA rather than Ugandan government cases on the basis of their relative gravity, though he did not rule out investigating alleged government crimes in the future.¹⁹

In contrast to the DRC, where the ICC has so far taken a cautious approach to its investigations and prosecutions, the Court has adopted an expansive strategy in Uganda, aiming from the outset to prosecute the top commanders of the LRA and claiming that in doing so, it could help deliver peace. This contrast suggests significant tensions within the ICC regarding its role: is its task simply to 'do justice,' thus fulfilling its legal mandate, or also to have a major impact on conflict? Like the DRC situation, however, the ICC's case selection in Uganda manifests major problems.

First, the ICC's investigations into LRA and not UPDF crimes create a perception of the ICC as one-sided and heavily politicised. A common view among community leaders and members of the political opposition in Kampala and northern Uganda is that, as one politician argued, 'the ICC has become Museveni's political tool'.²⁰ The OTP has so far failed to explain clearly its prosecutorial strategy in Uganda to help overcome this perception. Local and

international human rights groups have reported regular and grave atrocities committed by the UPDF in northern Uganda, particularly the forced displacement of around 1.5 million civilians into IDP camps. A recent qualitative study by the UN Office of the High Commissioner for Human Rights highlighted that the majority of the 1725 victims interviewed considered both the LRA and the government responsible for the immense harm they have suffered during the conflict.²¹

As in Ituri, the ICC argues that the current focus on LRA crimes is justified because these constitute the gravest atrocities perpetrated in northern Uganda. Prosecutor Ocampo has also emphasised that the ICC may yet investigate UPDF crimes. However, it appears highly unlikely that the ICC will prosecute UPDF suspects, given its reliance on the government for its continued presence in Uganda and its generally good relationship with key Ugandan officials. The author's interviews with government officials indicate that Prosecutor Ocampo approached President Museveni in 2003 and persuaded him to refer the Uganda case to the ICC. The referral suited both parties, providing the ICC with its first state referral of a case and the Ugandan government with another stick with which to beat the LRA.²²

The view that Museveni has instrumentalised the ICC is fuelled by the second problem with the Court's strategy in Uganda, namely the unusual grounds on which the ICC has opened the LRA cases. These grounds appear to contradict the OTP's own stated investigative and prosecutorial policies. They centre not on the basis of the unwillingness or inability of the Ugandan judiciary to prosecute serious cases but rather on the inability of government forces to capture and arrest the LRA leadership. While the Rome Statute permits ICC investigations and prosecutions wherever domestic jurisdictions are not seeking to prosecute the same cases, the Uganda situation nonetheless poses problems in terms of the ICC's broader policy of complementarity. The Ugandan judiciary – one of the most proficient and robust in Africa – is unquestionably able and willing to prosecute serious cases such as those involving the LRA. More importantly, even if it is considered justifiable for the ICC to open investigations on the basis that Uganda's military and police (rather than judicial) capacity is insufficient to address serious crimes, the fact remains that the ICC itself has neither military nor police capacity. In short, the ICC has opened the case in northern Uganda on grounds for which it is not adequately equipped to respond.

As with the DRC situation, the ICC has based its case selection in Uganda in part on the gravity of crimes committed but also on a desire to avoid prosecuting government officials, upon whom it relies heavily for security and evidence during ongoing conflict. The failure of any domestic or international party to capture and arrest the LRA leadership undermines the legitimacy of the ICC in the eyes of a Ugandan population that is already sceptical of the Court's apparent refusal to address government criminality.

Conclusion: pragmatism revisited

The ICC's operations so far in the DRC and Uganda provide crucial insights into how the Court perceives its role and establishes precedents for future investigations and prosecutions. In Uganda, the ICC adopted an expansive approach. Wanting to make its

mark in its first case, the Court opted to pursue the LRA commanders – several of whom had been at large for twenty years – and stated that it could help rapidly end the conflict. When this failed to transpire, the ICC reacted by adopting a more cautious strategy in the DRC.²³ There the Court focused on easier targets in the form of Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo and stressed that it would focus on its legal mandate, rather than any potential impact on the Congolese conflict.

Beneath these apparent differences in strategy in the DRC and Uganda lie crucial consistencies. In both situations, the ICC has been fundamentally motivated by self-interested pragmatic concerns, avoiding the fraught task of investigating and prosecuting sitting members of government who are responsible for grave crimes, while also overlooking the capacity of domestic jurisdictions to address the atrocities concerned. Such pragmatism reflects a new global institution that needs to get legal runs on the board in order to build support among its states parties and to be perceived as an established global actor in the fight against impunity.

The ICC's attempts to build close working relations with domestic governments highlight the unavoidable challenges of delivering international justice in the midst of ongoing conflict. However, the ICC's approach to case selection so far, while in accordance with the strict legal interpretation of complementarity in the Rome Statute, contravenes its broader policy of complementarity. More importantly, it has already undermined the Court's legitimacy among affected populations in the DRC and Uganda. In the eyes of the victims of grave crimes, until the ICC undertakes the difficult task of addressing government atrocities, the Court won't have truly arrived.

- 1 The author would like to thank the Open Society Justice Initiative, which generously funded much of the fieldwork on which this article is based, and in particular Kelly Dawn Askin and Tracey Gurd for their invaluable support. The views expressed in this article are the author's and not representative of the Open Society Justice Initiative.
- 2 M. Brubacher, "The ICC, National Governments and Judiciaries" in N. Waddell and P. Clark (eds.), *Peace, Justice and the ICC in Africa*, Meeting Series Report, London: Royal African Society, March 2007, pp.22-23.
- 3 The ICC is also tasked with prosecuting "crimes of aggression," an as-yet-undefined term. The ICC cannot exercise jurisdiction over crimes of aggression until the crime, and jurisdiction over it, are clearly defined at a review conference of the Assembly of States Parties, planned for 2009 (Rome Statute, Article 5).
- 4 Rome Statute, Articles 17 and 53.

- 5 L. Moreno Ocampo, "Instrument of Justice: The ICC Prosecutor Reflects", *Jurist: Legal News and Research*, 24 January 2007, <http://jurist.law.pitt.edu/forumy/2007/01/instrument-of-justice-icc-prosecutor.php>.
- 6 M. Arsanjani and M. Reisman, "Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court", *American Journal of International Law*, 99, April 2005, pp.387-388.
- 7 Office of the Prosecutor, "Paper on Some Policy Issues before the Office of the Prosecutor", The Hague: ICC, September 2003, p.3.
- 8 Office of the Prosecutor, "Paper on Some Policy Issues", p.3.
- 9 See, Office of the Prosecutor, "Remarks by the ICC Prosecutor Luis Moreno Ocampo at the 27th Meeting of the Committee of Legal Advisers on Public International Law (CADHI), Held in Strasbourg, on 18-19 March 2004", The Hague: ICC, 19 March 2004, p.4.
- 10 The unfortunate irony of the EU's focus on Ituri is that the Ituri judiciary is currently the most robust in eastern DRC, while the judiciaries in other provinces (which were initially considered to be more effective) now lag far behind. The Bunia judiciary's increased effectiveness as a result of EU and MONUC support was a point underlined to the author by the Bunia state prosecutor, Chris Aberi (Author's interview, Bunia, 4 February 2006).
- 11 Author's interview, Foreign Diplomat, Kinshasa, 25 January 2006.
- 12 Author's interview, Luis Moreno Ocampo, ICC Prosecutor, The Hague, 22 March 2006.
- 13 M. Allimadi, "ICC Probe for Nkunda, DRC Militia Leader", Black Star News, 20 December 2007, www.blackstarnews.com/?c=122&a=4008.
- 14 Pre-Trial Chamber I, "Situation dans la République Démocratique du Congo: Affaire le Procureur c/ Thomas Lubanga Dyilo: Prosecutor's Information on Further Investigation", Doc. ICC-01/04-01/06-170, The Hague: ICC, 28 June 2006.
- 15 Pre-Trial Chamber I, "Situation in the Democratic Republic of Congo in the Case of the Prosecutor vs. Thomas Lubanga Dyilo: Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007, <<Décision sur la Confirmation des Charges>>", Doc. ICC-01/04-01/06-806, The Hague: ICC, 5 February 2007.
- 16 If Lubanga is not prosecuted by the Congolese authorities for additional crimes, a conviction by the ICC could see him serve only a few years in prison before returning to Ituri. His undoubted arrival as a hero among many UPC members and supporters could provide a fillip to UPC activities in Ituri, potentially fuelling the conflict situation. Much of the UPC's military structure has recently been dismantled but many of its combatants remain armed and ready to fight.
- 17 P. Apps, "ICC Hopes for Uganda Trial in 6 Months, Then Congo", Reuters, 26 January 2005, available at: www.globalpolicy.org/intljustice/icc/2005/0126ugandatrial.htm.
- 18 Lukwiyia was shot dead near Kitgum in August 2006, during fighting between the LRA and Ugandan government forces. In October 2007 Otti was killed by LRA elements close to Kony after major arguments between the two leaders, including over LRA strategy at the Juba peace talks.
- 19 At a workshop in London in March 2007, Prosecutor Ocampo said, "LRA killings were many times worse than those by the UPDF. There's no question we had to start by investigating LRA crimes." (L. Moreno Ocampo, The Lord's Resistance Army: War, Peace and Reconciliation workshop, London School of Economics, 3 March 2007, notes on file with author.)
- 20 Author's interview, Ugandan Member of Parliament, Kampala, 2 March 2006.
- 21 United Nations Office of the High Commissioner for Human Rights, "Making Peace Our Own: Victims' Perceptions of Accountability, Transitional Justice and Reconciliation in Northern Uganda", Geneva: UNOHCHR, August 2007, p.3.
- 22 Author's interviews, Ugandan Government Officials, Kampala, 2-4 March 2006.
- 23 The ICC's case selection in the Darfur situation is arguably a return to a more expansive approach, as it includes the April 2007 issuance of arrest warrants for Ali Mohamed Abdel Rahman 'Kushayb' and Ahmed Mohamed Haroun, the latter the current Sudanese Minister of State for Humanitarian Affairs. However, the ICC's selection of a case involving a sitting member of government is eased greatly by its minimal reliance on the Sudanese government during its operations. In contrast to the DRC and Uganda situations, the Court received the Darfur referral from the UN Security Council rather than the Sudanese government and it is unable to investigate crimes on the ground in Darfur due to continued insecurity and the refusal of the government to cooperate with the Court.

6. Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda

Tim Allen

Introduction

A frequent criticism of the International Criminal Court's (ICC) role in northern Uganda relates to local forms of justice and can be summarised as follows: Justice cannot be imposed by international decree. It has to be locally grounded and socially acceptable. The Acholi people have their own ways of reintegrating people who have performed violent acts. Through a ritual called *mato oput*, or 'drinking the bitter root,' they seek compensation rather than punitive justice. They are willing to welcome back those who have been with the Lord's Resistance Army (LRA), and can forgive individuals who have done the most terrible things. The ICC intervention is therefore a Western imposition that ignores realities and attitudes on the ground. It is also counter-productive, because the LRA will not accept a peace deal if they are viewed as criminals. The way forward must be for the ICC to withdraw, and for local accountability procedures to be institutionalised and accepted as an alternative.¹

Since the ICC began its investigations in 2004, this championing of traditional justice has widened from references to *mato oput* to include other Acholi rituals as well as those of neighbouring populations. Citing the Rome Statute's requirements that the ICC act 'in the interests of justice' and 'in the interest of victims',² various actors have claimed to speak for the victims and exerted pressure on the Court to give way to 'their' version of justice. In practical terms, aid agencies have funded the establishment of 'traditional' leaders, including newly created paramount chiefs for the Acholi, Madi, Iteso and Langi peoples, with a vested interest in promoting the use of local rituals in addressing violent crimes. The LRA high command has also expressed favour towards local rituals, understandably finding the idea of some kind of reconciliation ritual more appealing than criminal prosecution. Even the Ugandan government is not opposed to the idea, now that the full implications of public trials at The Hague are clearer, notably that competent defence counsel for the accused could raise very embarrassing issues, including government implication in atrocities. Such views are reflected in the June 2007 Agreement on Accountability and Reconciliation and its Annexeure of 19 February 2008, which prescribes prosecutions through the Ugandan High Court and 'traditional courts' rather than the ICC.

This article sets out some of the problems with the current vogue for promoting traditional justice in northern Uganda as a supposed 'alternative to the ICC'. More specifically, it argues that the merits of reifying local rituals in a form of semi-official 'traditional justice' have been oversold and the dangers under-appreciated.

The promotion of traditional justice

When I began researching the ICC's role in northern Uganda at the end of 2004, the case being made by activists for local justice focused almost entirely on *mato oput*.³ This ritual was highlighted as an ancient mechanism that facilitated reconciliation of wrong-doers with those they had harmed, by providing compensation rather than revenge. A surprising number of people working with NGOs, the Christian churches and local human rights groups maintained that *mato oput* would play a key role in any peace deal. Funds had been made available to support *mato oput* rituals, and a council of 'traditional chiefs' or *rwodi* was created to perform them. The person selected to be the 'traditional' Acholi paramount chief was going to lead big *mato oput* ceremonies, at which even the LRA senior commanders could be accepted back into society.

The ceremony being called *mato oput* was talked about as if it were something unique. However, it was actually similar to other African rituals associated with conflict resolution and payment of compensation following a killing. It involved the killer and the family of the bereaved drinking a concoction of the blood of sacrificed sheep and a bitter root to indicate that their dispute had been resolved, following agreement about compensation. *Mato oput* occurred only rarely, as negotiations over compensation typically took place after murder within a moral community, rather than after a local war or clan feud.

A reason why *mato oput* was singled out to represent local justice stemmed from an influential report, which had argued that the best response to conflict in northern Uganda was to combine *mato oput* with another, even rarer, ritual called *gomo tong*, 'bending the spear'.⁴ The latter ceremony typically occurred at the end of a local war, symbolising the termination of the fighting. Although it was not entirely clear how it would happen, advocates of local justice argued that external support for a linkage of *mato oput* and *gomo tong* could lead to collective reconciliation among the Acholi population. This would require the establishment (or re-establishment) of a council of traditional chiefs, funds for the performance of rituals and perhaps also for compensation payments to victims.

Two assessments of the approach at the end of the 1990s suggested that this was not a viable proposition.⁵ Among other problems, it was noted that the rituals were associated with the gendered hierarchies of particular lineages, and there was no consensus in the population that the kind of social healing proposed was either possible or appropriate. Nevertheless, aid agencies, Christian groups and peace activists looking for non-government-aligned community partners found the idea appealing. Funds became available from a variety of donors, notably the Belgian government, and the process was on its way.

The situation initially moved slowly, mainly due to a dramatic increase in insecurity in northern Uganda, but the passing of the Amnesty Act in January 2000 provided a legal context, and the ICC referral proved to be a catalyst. A host of new supporters entered the arena of Acholi traditional justice, viewing it as more acceptable than the imposition of criminal prosecution based on trials in a faraway country. By mid-2005, *mato oput* ceremonies were being performed regularly, often attended by a host of aid workers, activists and journalists. The Acholi paramount chief had also started performing large-scale rituals. Remarkable

claims were made about the effectiveness of these activities, many of which were interpreted unquestioningly and discussed in the international media.

Traditional justice on the ground

Amid this promotion of traditional justice, however, local level research was revealing a different and more complicated story.

First, there were ambiguities in the ways these rituals were being described. They were not necessarily linked to forgiveness in the sense that activists suggested. The Acholi term *timokeca* has a range of meanings, from formal amnesty to the Christian notion of turning the other cheek or simply having a formerly abducted person living in the home (perhaps because there was an incentive in the form of an assistance package from an aid programme if such a person is hosted). This meant that assertions about a remarkable Acholi capacity to 'forgive,' as manifest in *mato oput*, were sometimes a misrepresentation of what local people were actually saying.

Moreover, regarding putative *mato oput* ceremonies, none of those investigated was directly connected with the LRA.⁷ Also, the extent to which they constituted 'genuine' *mato oput* is questionable, given that they did not involve any commitment to pay compensation.⁸ In fact, most of the ceremonies performed directly under the auspices of the paramount chief did not even involve drinking a concoction made from a sacrificed sheep and a bitter root. Scores of interviews showed there to be little general interest in the new public events. On the contrary, most respondents were dismissive of them⁹, while a few thought they would make things worse by concentrating spiritual pollution. Unsurprisingly, Madi, Langi and Iteso informants were even more dismissive, asking why, if they had also suffered at the hands of the LRA, should the Acholi alone do all the forgiving. Ultimately, it becomes hard to avoid the conclusion that where ceremonies were performed, this was largely because of the availability of external support.

Reforming, transforming or deforming?

Partly in response to such critical findings¹⁰, those seeking to promote local justice have recently attempted to broaden the range of rituals supposedly constituting a traditional judicial system. More than a dozen other Acholi rituals have been highlighted in recent reports, as well as some rituals associated with neighbouring groups. This is reflected in the 'Agreement on Accountability and Reconciliation' reached by the Government of Uganda and the LRA in June 2007 (discussed below), which mentions four other rituals as well as *mato oput*.¹¹ This elaboration of the traditional justice argument to include more diverse rituals is a positive step, but it does not resolve the potential problems involved in turning selected local practices into something new. Rites have been reified. They have been taken out of their original contexts and transformed.

During my years with the Acholi and Madi people, calls for the performance of a specifically named ritual have been rare.¹² More commonly, people reach consensus about a particular

home or individual that should be ritually cleansed or a sacrifice that should be performed at a shrine to mark a collective response to a particular problem or the resolution of a dispute. The name and the nature of the ritual, however, may vary widely and listing rituals as if they are codified practices is misleading.

This does not mean that codifying select rituals is impossible. If there is external support for doing so, and figures of authority are created to perform them, then they may become formalised into a pseudo-traditional system. Some activists in northern Uganda are currently promoting such an agenda, and among them are those likely to gain most in local political influence, notably the newly created council of 'traditional' chiefs. However, practices included in such a system will be altered in the process. They will lose their flexibility and will no longer have all of the many resonances and associations of lived rituals. Drawing their status at least partly from externally supported authorities, they will become privileged rites and most likely the preserve of certain male leaders recognised by the government.¹³

There are parallels here with efforts by medical professionals to work with 'traditional' healers. The kinds of ritual practices described in recent publications about northern Uganda are mainly connected with relatively benign ways of negotiating misfortune and promoting well-being.¹⁴ They are actually the same sorts of activities that have been noted in Uganda and elsewhere by researchers and professionals working on public health. Ritual specialists are commonly involved in both individual and collective therapies, and can be viewed as dispensers of 'traditional healing' as well as 'traditional justice.' Where medical personnel have made efforts to train and collaborate with them, new kinds of hybrid healers have emerged. Their credibility may draw on local practice but it is also related to linkages to external aid agencies and formal health care services. Supporting the performance of selected rituals as 'traditional justice' may have similar effects.

It is also important to note in this context that, when ritual practices are frequently repeated, and particularly when they are connected with locally powerful ideas and people, they can affect ways of thinking. There is nothing sinister in this. It is, for example, why regular collective participation in Christian rituals is so significant for Christian churches. If certain rituals, perhaps even *mato oput*, are effectively adapted and institutionalised in locally convincing ways, then they may well start to shape the understandings of their participants. At present, that is not happening, but it is a possibility. Indeed the local power of ritual in northern Uganda is underlined by the success of both the Holy Spirit Mobile Forces and the LRA in framing the worldviews of their recruits. The rebel movements have connected traditional ideas about cleansing and anointing with Christian rites of worship. It has been a heady mix and has had a deep impact on some of the impressionable youngsters who have been abducted. At one level, the current enthusiasm for traditional justice seems to be an attempt to replicate aspects of Joseph Kony's methods and to compete with them. As Mark Bradbury argued in 1999:

...an interesting aspect of the emphasis on Acholi traditional practices is the way it resembles the efforts of Lakwena and Kony to cleanse Acholi society of evil spirits and witches. The traditional ritual practices of elders seem to be being pitched against the rituals of Kony. Perhaps the battle is not just for the hearts and minds of the Acholi, but also for the soul.¹⁵

At the very least, this should alert enthusiasts for traditional justice to the fact that the ceremonies they select to be codified are not in themselves systems of accountability, but modes of expressing ideas. Those ideas may not always be as socially progressive as they imagine.

Following Rwanda's lead?

Not far away from Uganda, in Rwanda, the *gacaca* courts have become a national initiative. Some advocates of traditional justice in northern Uganda view *gacaca* as a model that might be adapted for import.¹⁶ Uganda, however, is far more ethnically diverse than Rwanda. Furthermore, while *gacaca* has traditionally been practised throughout Rwanda, Uganda also lacks any strong historical precedent in terms of an integrated traditional justice system – either within or between different ethnic groups. Northern Ugandan customs and rituals have varied from place to place and from one social network to another, and have been drawn upon in a habitual and flexible manner. If the use of local rituals to address serious crimes in Uganda is to be a national project, what are the relevant rituals from the Banyankole, Baganda or Banyoro? Why are only selected northern rituals mentioned?

The case of *gacaca* shows that it is feasible to create hybrid mechanisms that combine rituals with formal judicial features.¹⁷ However, there would have to be constraints and careful monitoring, presumably by the Ugandan government.¹⁸ Without regulation, rituals and customs are as likely to be adapted to interpret and punish witchcraft and sorcery as they are to deal with more 'conventional' instrumental killings and mutilations. There are serious risks in local customs and rituals being interpreted as benign and providing support for a particular group to use them to serve their own interests.

Traditional justice and the ICC warrants

Some sources imagine that the ICC has a capacity to withdraw its warrants at any time, and should be made to cease its activities in favour of vaguely formulated conceptions about African ways of doing things. However, others have a more informed position, arguing that reformed mechanisms of traditional justice could be made robust enough for the Ugandan government to make a case to the ICC's Pre-Trial Chamber to withdraw the Court's arrest warrants under Article 17 of the Rome Statute. These sources point out that the Court is required to act in a 'complementary' way with the national judiciaries of state parties.¹⁹ They realise that for cases to be judged inadmissible before the ICC, they must be genuinely investigated and prosecuted by the national justice system. It is therefore necessary, they claim, for 'traditional justice' to be brought into the formal Ugandan judicial system, and for the Ugandan government to challenge the jurisdiction of the Court. In addition to various peace activists, the LRA delegation at the peace talks in Juba has adopted this idea, and the Ugandan government has expressed a willingness to consider it.

In this light, the Agreement on Accountability and Reconciliation signed in Juba is especially noteworthy. During discussion towards the Agreement, the government-owned *New*

Vision newspaper reported, 'The Government plans to ask the International Criminal Court to drop the charges against the rebel commanders for war crimes and crimes against humanity once a peace agreement is signed and an alternative justice system agreed.'²⁰ This would require the government to challenge the admissibility of the cases before the ICC. To do so successfully, the government would have to demonstrate that it is carrying out genuine domestic proceedings regarding the same persons, conduct and incidents for which the ICC has issued arrest warrants.

The Agreement is a vague creature of compromise but, with particular allusion to the LRA leaders facing ICC warrants, it does mention that alleged 'international crimes' should fall under the jurisdiction of 'formal courts provided for under the [Ugandan] Constitution'. The formal domestic proceedings that the Agreement envisages – and to which the February 2008 Annexure adds a degree of detail – could conceivably meet the standards necessary to impede the Court from exercising its jurisdiction. Elsewhere, although the Agreement mentions a selection of local northern Ugandan rituals and suggests that these will be appropriate to deal with LRA returnees, it does not explain how this might happen.

What the LRA appears to have achieved in Juba is an alternative to the formal Amnesty Law of 2000, to which their delegation has objected on the grounds that it implicitly criminalises their armed campaign. The Agreement provides a degree of official recognition for reconciliation rituals but does not outline how they might be reformed or codified. Doubtless the LRA high command and others keen on traditional justice arrangements hope the Agreement will strengthen the case for the removal of the ICC warrants on complementarity grounds. However, even if traditional justice mechanisms were somehow reformed and formalised sufficiently to prompt the ICC to defer to domestic proceedings, reliance on codified rituals would essentially throw the horrors of northern Uganda back onto the people who live there. Using 'traditional justice' risks implying that the government and the rest of the country have nothing to do with the northern conflict, and also that northern Ugandans need their own special justice measures, because they are not yet ready for modern ones.

Conclusion

Exaggerated claims about *mato oput* and other local modes of allocating accountability have suggested that the Acholi and other groups in northern Uganda are in some way different. Of course they have their own unique ways of life, but like decent people everywhere else, they require a functioning state to make the best of their lives, including conventional forms of legal protection from those who might oppress them. In the end, peace in northern Uganda relies on sufficient political will, relative stability across the border in Sudan, and the deployment of adequate legitimate force to guarantee security. Until recently, government soldiers deployed in the war zone have not achieved that end, and may not have considered the protection of the population their primary objective. The situation now appears to be changing, partly due to international scrutiny of the region linked to the ICC intervention. When peace comes, it will be sustainable if there is an improvement in living standards, sufficient provision of public services and the

establishment of viable forms of governance that serve the interests of the population.

The obsession of so many concerned about the suffering in northern Uganda with 'traditional justice' inadvertently reinforces a tendency to demonise the people of the region. For political and historical reasons, the Acholi in particular are caricatured as innately violent and primitive. They are therefore thought to be less concerned about terrible acts than other populations. In Kampala, this is offered as an explanation for their willingness to forgive, and it is common to hear comments about leaving the uncivilised northerners to their own devices. The campaign for regionally and 'tribally' specific traditional justice has done nothing to promote national integration. The commitment of those who assiduously promote it for selfless reasons is worthy of a better cause.²¹

- 1 This position has been variously formulated. See, Archbishop J. B. Odama, speech in Japan, www.npf.or.jp/english/peace_prize/speeches/21th.pdf – no date given; B. Afako, "Reconciliation and justice: 'Mato oput' and the Amnesty Act", Conciliation Resources, 2002, www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php; Z. Lomo and L. Hovil, "Behind the Violence: causes, consequences and the search for solutions to the war in northern Uganda", Refugee Law Project Working Paper no. 11, February 2004, www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP11.pdf. An excellent article on Uganda and the ICC is A. Branch, "International Justice, Local Injustice", *Dissent*, Summer 2004, <http://dissentmagazine.org/article/?article=336>. James Otto, of Human Rights Focus in Gulu town, expressed the above view in an interview with the author, May 2005.
- 2 The phrases 'interests of justice' and 'interests of victims' appear in Rome Statute, Articles 53, 54, 55, 61, 65, 67 and 68.
- 3 Government of Uganda and the Lord's Resistance Army, "Annexure on Mechanisms for Accountability and Reconciliation", Juba, Southern Sudan, 19 February 2008.
- 4 T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, London: Zed Books, 2006.
- 5 D. Pain, "The Bending of the Spears: Producing Consensus for Peace and Development in Northern Uganda", London: International Alert and Kacoke Madit, 1997.
Research on traditional leadership was carried out by ACORD with Belgian government funding. See www.acord.org.uk/r-pubs-Cope%20Working%20Paper%2032.pdf. See also C. Dolan, "Inventing Traditional Leadership? A Critical Assessment of Denis Pain's 'The Bending of the Spears'", COPE Working Paper 31, April 2000. See also M. Bradbury, "An Overview of Initiatives for Peace in Acholi, Northern Uganda", Reflecting on Peace Practice Project, October 1999, [/www.cdainc.com/publications/rpp/casestudies/rppCase02Uganda.pdf](http://www.cdainc.com/publications/rpp/casestudies/rppCase02Uganda.pdf).
- 6 See, for example, M. Lacey, "Atrocity victims in Uganda choose to forgive", *New York Times*, 18 April 2005.
- 7 They were all performed to deal with homicides within the population, usually many years before.
- 8 At one such event, organised by the Northern Ugandan Peace Initiative in 2005, the paramount chief admitted publicly that he did not know how to perform the traditional mato oput ceremony.

- 9 This included senior former LRA officers. When I interviewed the LRA brigadier, Sam Kolo, after his surrender in 2005, he seemed not to take the paramount chief's mato oput ceremony seriously.
- 10 The findings were circulated in draft form in early 2005, and corroborated by other researchers later that year. See, for example, International Center for Transitional Justice and Human Rights Center, University of California, Berkeley, "Forgotten Voices: A population-based survey on attitudes about peace and justice in northern Uganda", New York: International Center for Transitional Justice and Human Rights Center, University of California, Berkeley, 2005.
- 11 The full text of the Agreement is available at www.fides.org/eng/documents/uganda_agreement_290607.doc
- 12 I lived and researched in the region from 1982-1984, and from 1987-1991. I returned in 2004.
- 13 Although the new cohort of traditional chiefs claims to have royal ancestries that reach far back in time, they are mostly the descendents of people recognised or selected as government agents in the early twentieth century and whose local legitimacy is highly contested.
- 14 See, for example, Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi, "Roco Wat I Acoli: Restoring Relationships in Acholi-land – Traditional Approaches to Justice and Reintegration", September 2005, www.ligi.ubc.ca/. It is striking that such reports set aside less benign, and frequently violent, rituals associated with accusations of witchcraft.
- 15 M. Bradbury, *An Overview of Initiatives for Peace in Acholi*, p.20.
- 16 See, for example, G. Gordon, "What northern Ugandans really want", Reuters AlertNet, 13 July 2007, www.alertnet.org/db/blogs/33567/2007/06/13-140154-1.htm
- 17 P. Clark, "Hybridity, Holism and 'Traditional' Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda", *George Washington International Law Review*, forthcoming, March 2008.
- 18 Depending on how it was implemented, such oversight may undermine notions of local participation and ownership.
- 19 See, for example, "LRA/M Position Paper on Accountability and Reconciliation In Relation to the ICC Indictment of 20th June 2007", www.acholinet.com/index.php?Itemid=139&id=190&option=com_content&task=view.
- 20 New Vision reporter, "LRA Accept Responsibility for War Crimes", *New Vision*, 22 June 2007, www.newvision.co.ug/D/8/13/572055.
- 21 The argument presented in this paper is developed in more detail in T. Allen, "The International Criminal Court and the Invention of Traditional Justice in Northern Uganda", *Politique Africaine*, 107, October 2007, pp. 147-166, www.politique-africaine.com/numeros/resumes/RESA_107147.htm.

7. Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo

Géraldine Mattioli and Anneke van Woudenberg

Introduction

Over the past decade, the people of the Democratic Republic of the Congo (DRC) have endured horrific atrocities at the hands of a multitude of armed groups, foreign forces, militias and the national Congolese army. The victims are ordinary citizens who have suffered massacres, torture, widespread sexual violence, forced displacement and property loss.¹ Impunity for grave violations of human rights has long been the norm in the DRC. Only a handful of perpetrators have been arrested and held to account; dozens of others have been promoted to senior positions in the Congolese army or the government. As one Congolese lawyer recently commented, 'In Congo we reward those who kill, we don't punish them.'²

In this gloomy picture, the involvement of the International Criminal Court (ICC) has given some hope that the DRC's culture of impunity might be coming to an end. In June 2004, the ICC Prosecutor, Luis Moreno Ocampo, opened the Court's first ever investigation in the DRC, initially focusing on the district of Ituri in north eastern DRC where some of the worst atrocities have taken place. The investigations to date have led to the arrest and transfer to The Hague of three senior Iturian militia leaders: Thomas Lubanga Dyilo on 17 March 2006; Germain Katanga on 17 October 2007; and Mathieu Ngudjolo on 6 February 2008. Investigations continue and it is likely that further arrests will follow.

Despite these arrests, the DRC's immense accountability needs cannot be addressed by the work of the ICC alone. Realistically, the Court will only be able to try a few senior individuals most responsible for widespread crimes. The ICC's success in the DRC and elsewhere will depend on its ability to encourage national prosecutions, to help build respect for the rule of law, and thus to contribute to deterring future crimes. Such elements are all crucial to the notion of 'positive complementarity.' The principle of complementarity in the Rome Statute determines passively the jurisdictional basis of the ICC, holding that the Court will act only when countries are unwilling or unable to investigate and prosecute serious crimes. By contrast, the notion of 'positive complementarity' involves the Court actively catalysing domestic processes. The ICC Prosecutor says that positive complementarity is a key principle guiding his prosecutorial strategy.³ Besides conceptual ambiguities over positive complementarity, what does it mean in practice?

This essay examines some of the practical problems and opportunities surrounding positive complementarity in the DRC. It examines whether the ICC is succeeding in building close links with the national judicial system and other actors to encourage national prosecutions, and how it is contributing to deterring future crimes and building respect for

the rule of law. The essay also provides an overview of the challenges facing the Court in this task. It argues that there are distinct opportunities that the Court must seize if positive complementarity is to go beyond an attractive but vague concept.

Congo: a cry for justice

When the Prosecutor opened the ICC's first investigation in the DRC in 2004, expectations ran high that the Court would bring justice to victims and deter future crimes. Some of these expectations may have been unrealistic. Three years on, the Court's work and impact in the DRC are mixed.

The Court has had notable successes, particularly the arrest of Lubanga, Katanga and Ngudjolo. The trial of Lubanga, arrested on charges of recruitment, enlistment and use of child soldiers, is set to start in June 2008. Human Rights Watch researchers documented important effects of this first arrest. While it is not clear if crimes reduced as a result, one impact was that other suspected war criminals expressed fear of possible future arrest.⁴ The confirmation of charges hearing against Lubanga also increased awareness that the recruitment and use of children as soldiers constitute crimes. For example, some leaders of armed groups in eastern DRC instructed children to lie about their age and to hide when child protection workers arrived. In Ituri, many children were chased away from the militia groups. The link between such cover-up attempts and the Lubanga case at the ICC even prompted UN agencies and NGOs to speak of 'the Lubanga syndrome'.⁵ While this may have created problems for child protection workers and their efforts to demobilise children in the short term, there is general agreement that increased awareness about the seriousness of this crime is positive.

At the same time, the ICC's intervention in the DRC remains disappointing. After three years of investigations, the Court has arrested only three individuals. The charges brought against Lubanga, while serious, do not represent the full extent of the atrocities committed by his forces. People in Ituri question why Lubanga has not been charged with the massacres, killings and torture that his forces perpetrated. Germain Katanga and Mathieu Ngudjolo, for their part, were charged with a more representative set of crimes (including killings, inhumane acts and treatment, pillaging and sexual slavery), suggesting that the Office of the Prosecutor (OTP) has learnt from earlier mistakes. More arrest warrants have been promised, but the Prosecutor's investigation to date is widely perceived as slow and one-sided. No action has yet been taken against high-ranking individuals in the government in Kinshasa or against those in neighbouring Rwanda and Uganda who armed, supported and frequently directed Ituri's armed groups, thereby contributing to the slaughter of an estimated 60,000 people.

It is clear that the ICC, for a variety of reasons, including insufficient resources, cannot comprehensively address the profound accountability void in the DRC. Experience from other international tribunals and field research in the situations under investigation by the ICC suggest that the Court's mandate will not be fulfilled by conducting only a small number of thorough investigations with fair trials in The Hague – however crucial these tasks are. The

success of the ICC will depend on its ability to have a lasting impact on the societies most affected by the crimes. The Court will need to encourage national prosecutions as part of a wider plan to ensure that its operations have a lasting impact at the local level.

Effective national prosecutions in the DRC are all the more important because many grave crimes committed in the country fall outside of the temporal jurisdiction of the ICC, starting on 1 July 2002, when the Rome Statute came into effect. Despite this important limitation, the international community has been unwilling, to date, to create additional mechanisms to help the DRC address the impunity gap.

The notion of 'positive complementarity'

Some level of cooperation between the ICC and national courts is envisaged by Article 93 of the Rome Statute, which states that the Court may cooperate with, and provide assistance to, a State Party which is investigating or trying a crime within the jurisdiction of the Court.⁶ Nonetheless, it is contested as to how far the Rome Statute provides the ICC with a mandate to pursue positive complementarity. There is certainly some support for the position that the spirit of the Rome Statute speaks in favour of a proactive interpretation of complementarity as a tool to end impunity. Notably, some of the OTP's public statements show determination to encourage national prosecutions. The ICC Prosecutor initiated discussions on the notion of positive complementarity at a public hearing in June 2003 in the wake of his election.⁷ The OTP continues to refer to positive complementarity as one of the key principles guiding prosecutorial strategy.⁸

What this means in practice is unclear. The OTP has cited examples of positive complementarity activities that seem to reveal a very broad approach.⁹ Considering the ICC's limited resources to encourage national prosecutions, the authors believe that the Court should develop a strategy that would differentiate among countries under ICC investigation, countries under analysis and other states parties. The Court's strategy should focus on increasing its impact on the national courts in the countries where it is conducting investigations.

The situation in the DRC: does positive complementarity work in practice?

Not only are initiatives to foster national judicial capacity sorely needed in the DRC, there are also signs that practical commitment by the ICC in this area would yield results. The Congolese judicial system lacks the capacity to prosecute grave international crimes.¹⁰ Both the military and the civilian judicial systems are starved of resources and competent personnel. Magistrates are badly paid and poorly trained. Political interference and corruption often determine the outcome of cases.¹¹ The UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, after a visit to the DRC in April 2007, concluded that interference by the executive and the army in judicial proceedings was 'very common' and that the DRC's judicial system was 'rarely effective... with human rights violations generally going unpunished'.¹² Many

procedures fail to come close to international standards of fair trial. Political authorities have shown little commitment to national prosecutions of international crimes, as demonstrated by the lack of progress in the adoption of the ICC implementing legislation.

At the same time, there is commitment on the part of a range of international donors, national judicial officials and NGOs to push judicial reform in the country.¹³ Increasing the DRC's judicial capacity is a huge undertaking and progress will inevitably be slow. Enabling national courts to conduct fair and effective trials for complex international crimes possibly presents even greater challenges. However, the past two years have seen some encouraging developments. The Congolese military courts¹⁴ have conducted a handful of prosecutions of low-level or mid-level offenders for war crimes, crimes against humanity and sexual violence.¹⁵ These prosecutions suggest the possibility of a degree of 'burden sharing' between the ICC – which would prosecute 'the big fish,' untouchable by the national judicial system – and national courts, which would contribute to closing the impunity gap. Congolese authorities and judicial officials have also been reasonably cooperative with the ICC to date, suggesting potential for closer cooperation on domestic war crimes prosecutions

a) A one-way partnership?

When OTP staff first started operating in the DRC they informed local judicial partners in Ituri and Kinshasa that they would collaborate closely with them and assist with their cases.¹⁶ National prosecutors in Ituri and Kinshasa are familiar with the term 'complementarity' and have high expectations of the OTP's assistance in handling complex cases of serious crimes. There is little doubt that OTP staff at the working level genuinely want to implement the concept of 'positive complementarity'. However, a meaningful collaboration has yet to materialise. National judicial officials in Ituri and Kinshasa report that they have not received any assistance from the OTP.¹⁷ Human Rights Watch researchers were told that the interaction between the OTP and national judicial officials in Ituri and Kinshasa has been functional, but only in relation to ICC investigations and cases. OTP staff have requested access to local investigative dossiers¹⁸ and have secured other forms of assistance.¹⁹ National judicial officials expressed disappointment and frustration that cooperation has, to date, been in only one direction. They have a wide range of ideas about what the OTP could do that would assist them in their work, as discussed below. OTP staff themselves admit that they are at the early stages of their thinking regarding viable means to cooperate with national judicial systems.²⁰

b) Challenges

For the ICC, establishing closer links and cooperating effectively to assist the Congolese national judicial system is a demanding task. The ICC's complementarity mandate, which opens the possibility of an effective collaboration with national courts, also demands caution on the part of the OTP. Indeed, at the early stages of his investigation, the Prosecutor does not know the identity of his targets. Consequently, assisting the national judiciary regarding crimes that are the object of his investigation may jeopardise the admissibility of his cases under the complementarity regime.²¹ Combined with the OTP's scarce resources and the need to advance its own cases, this means that the issue of positive complementarity has

been sidelined. So far, the OTP and the Court as a whole have not articulated a clear vision of what a sound positive complementarity policy could encompass.

Yet even if the Court were to be more proactive in terms of positive complementarity, it would face the current deficiencies in the functioning of the Congolese national judicial system. These deficiencies raise the question of the extent to which the ICC can appropriately cooperate with national courts without compromising its integrity. For example, it is unlikely that the OTP could share with national courts witnesses or confidential information that could expose vulnerable sources. Given the sensitive nature of trials for serious crimes, witnesses in such trials face serious risks. The DRC has no domestic laws that impose sanctions for interfering with witnesses and no comprehensive witness protection programme. Human Rights Watch researchers were told about threats to witnesses in some sensitive cases involving serious crimes.²² Indeed finding witnesses who are willing to testify remains a major hurdle for national prosecutors. In Bunia, the human rights section of the UN peacekeeping force, MONUC, has assisted with the protection of witnesses in the past but only in an *ad hoc* fashion.²³

It would also be problematic for the ICC to contribute to proceedings where the accused is not assured a fair and impartial trial. The Congolese record in that regard raises serious concerns – not least because military rather than civilian courts currently have jurisdiction over serious human rights violations.²⁴ This is problematic for several reasons, including a record of interference by political and military authorities in sensitive cases.²⁵ Finally, the DRC has not yet abolished the death penalty. It would be inappropriate for the ICC to contribute direct evidence against an accused who faces the risk of being sentenced to death.²⁶

At a meeting of the Comité Mixte de Justice (Mixed Justice Committee)²⁷ in Kinshasa in 2007, the OTP argued that certain benchmarks would need to be met before it could respond to cooperation requests by national courts.²⁸ The Congolese authorities and judicial system must demonstrate their good faith by endeavouring to meet such benchmarks as a condition for a deeper form of positive complementarity (whereby the OTP would directly assist in specific cases) than presently exists. The OTP, however, has not yet clearly spelt out what such benchmarks would entail.

c) Opportunities for positive synergies and lasting impact

Notwithstanding the ICC's limited mandate and resources, and the challenges of cooperation in cases involving specific accused persons, there are other measures that the Court could take to facilitate positive complementarity. Such measures, at relatively small cost, would go a long way towards increasing the ICC's impact on the national judicial system in the DRC.

The impact of the ICC in the DRC to date (even in the absence of a proactive complementarity plan) underscores this potential. In recent war crimes cases before military courts, judges made explicit references to the Rome Statute in their decisions.²⁹ For example, in April 2006 a military tribunal in Songo Mboyo directly cited the Rome Statute in sentencing seven members of the Congolese army to life in prison for collective rape. For the first time, a court in the DRC designated collective rape as a crime against

humanity. In another case in June 2006, the military tribunal of Mbandaka cited the Rome Statute in sentencing 42 soldiers after convictions on counts of crimes against humanity. In August 2006, the military tribunal in Bunia found the rebel leader Chief Kahwa Mandro guilty of six charges, two of which (war crimes and crimes against humanity) resulted from the direct implementation of the Rome Statute in Congolese law.

Even if the use of jurisprudence and legal concepts in such cases is not perfect, these instances show an interest in incorporating concepts of international criminal law into domestic jurisprudence. Local judicial officials in Ituri displayed an impressive degree of enthusiasm and courage for undertaking prosecution of international crimes.³⁰ The ICC would do well to build on these instances of local willingness.

Proposals for positive complementarity in the DRC

The Court has unique expertise in one particular field of judicial activity: prosecuting cases of serious crimes. As such, it can usefully complement efforts by other actors involved in broader judicial reform in the DRC.³¹

First, the Court should push for harmonisation of domestic legislation with the Rome Statute through the adoption of implementing legislation into domestic law. As mentioned above, one important aspect of the draft implementing legislation is that it proposes to shift jurisdiction for ICC crimes from military to civilian courts. Senior ICC officials, including the Registrar, judges and the President of the Court, could regularly and publicly stress the importance of implementing legislation and call for the prompt adoption of the draft law. Advocacy should be directed toward both the government and parliament, and such public calls would be a strong basis for action by civil society. Second, OTP staff could share expertise and provide training in issues related to prosecution of mass crimes. This could apply to specific international legal issues such as modes of liability, elements of crimes, or defences. For instance, a local prosecutor in Ituri stated that he would like to discuss with ICC prosecutors how to prosecute the recruitment of child soldiers as a war crime.³² This would enable him to prosecute a widespread practice that is not penalised as such in Congolese law. The OTP could also advise local prosecutors on investigative techniques and thus help build domestic capacity. Local prosecutors in Bunia expressed a thirst to learn, mentioning, in particular, forensic techniques, handling of traumatised victims, and investigation of mass graves.³³ It is not unreasonable to expect OTP investigators and prosecutors to spare a small amount of time during investigative trips to share their knowledge with their local counterparts in areas where the OTP is conducting investigations.

In light of its limited resources and the Court's policy of prosecuting those bearing greatest responsibility for the most serious crimes, the OTP could also share information stemming from its own investigations that it does not intend to use. For example, the Court could encourage Congolese authorities to initiate proceedings against individuals whom it will not prosecute but against whom it has found evidence during its investigations, or regarding specific incidents it has documented but will not prosecute. Adopting such

policies may help to address some of the criticisms of the limited charges brought in the Lubanga case, despite the OTP's having information on many other crimes.

While sharing confidential documents, witnesses, or direct evidence may raise difficulties, as discussed above, some of these challenges could be addressed by sharing only information that would not compromise the confidentiality and security of sources. Lessons may be learnt in this regard from other international tribunals. For example, once trials are underway, the ICC could make its database of non-confidential material used in proceedings accessible to local prosecutors and defence counsels, as the International Criminal Tribunal for the former Yugoslavia (ICTY) has done with its Evidence Disclosure Suite. In the geographical areas under ICC investigation, the OTP may also help local prosecutors regarding specific patterns of criminal activity. In Ituri, for example, the OTP has expertise and specific knowledge of the situation, acquired through its investigations that it could discuss in broad terms with national judicial officials.

As mentioned above, the OTP has taken the lead at the ICC in terms of promoting the issue of positive complementarity. There is, however, a role for all of the Court's organs in this endeavour, and the Court as a whole should view positive complementarity as a crucial part of its broad strategy for delivering justice. Through events directed specifically at national judicial staff and lawyers, the Court should look at using its outreach programme to create a more lasting impact on national judiciaries. For example, ICC staff working on victims and defence issues have participated in the training of judicial officials in the DRC organised by international NGOs.³⁴ This practice should be maintained and further developed in eastern DRC, where judicial officials are more directly confronted with international crimes. This may help guarantee minimum standards of international law. Judicial officials in Ituri have also stated that they would like to have access to ICC documents, such as transcripts and decisions, to use as models for local courtroom proceedings.³⁵ This practice was developed by the outreach programme of the Special Court for Sierra Leone, which prepared bound versions and CDs of the Court's jurisprudence that were distributed to local judges and law faculties.³⁶

The Victims and Witnesses Unit of the ICC could also usefully provide information and training to local authorities on how to conduct witness protection programmes. This would contribute greatly to the integrity of the local system, while addressing a key concern of the OTP in sharing information and being involved in domestic procedures. Finally, the ICC has important experience in dealing with traumatised and vulnerable victims, such as victims of sexual violence, women, children and the elderly. This experience would be invaluable in conflict countries where such challenges are endemic and domestic capacity is severely limited.

The role of States Parties

The Assembly of States Parties should support and encourage the ICC to conduct the activities just discussed. Moreover, donors involved in judicial reform in the DRC should also cooperate with the ICC to help to increase the Court's impact on national judiciaries,

and to encourage the national system to address international crimes. As mentioned above, the Court's action in the field of positive complementarity is central but necessarily limited. The Court's supporters must therefore engage strongly in encouraging national prosecutions. While States Parties and ICC supporters are generally interested in the impact of the ICC³⁷, they often fail to connect this with their own efforts to implement judicial reform. This is certainly true in the DRC. Such actors should encourage justice for grave crimes and contribute to building local capacity. For example, the European Commission and other donors are currently implementing a project called REJUSCO, focusing on rebuilding the justice system in eastern DRC. Previous European support in Ituri has been pivotal in enabling prosecution of serious crimes. On paper REJUSCO includes a component on transitional justice. However, early implementation of the project does not demonstrate a commitment to strengthening local capacity to prosecute serious international crimes. This risks missing an important opportunity.

Conclusion

There are inherent difficulties and contradictions in the ICC pursuing a strategy of positive complementarity. Cooperating closely with national Congolese courts raises questions about strict adherence to international legal standards in a deeply flawed national justice system. Nonetheless, exciting prospects exist for strengthening links between the ICC and the national Congolese judicial authorities to encourage national war crimes prosecutions.

The Congolese context points toward a broader need for the ICC to determine, whenever possible, how to promote credible investigations and fair trials for serious crimes in the national courts of countries where it is active. The Court could act as a catalyst for change. This does not imply that the ICC should operate as a development agency. Rather, the Court should focus on what it does best – the prosecution of international crimes. The ICC is well placed to push for broader accountability and to complement the efforts of other actors, including international donors and national judicial authorities.

In practical terms, the ICC should, as a matter of priority, begin to work on guiding principles for supporting national prosecutions. As far as possible, this process should be public, to allow stakeholders' input. Failure to translate the international community's investment in the ICC into tangible strengthening of national judicial systems would represent a major lost opportunity. Local courts matter most in bringing to justice the scores of perpetrators who committed and continue to commit atrocities in the DRC. To tackle the DRC's culture of impunity, the ICC and the international community must encourage and, wherever possible, actively assist local prosecutions.

- 1 For more information, see Human Rights Watch's work on the Democratic Republic of the Congo, www.hrw.org/doc?t=africa&c=congo.
- 2 Human Rights Watch interview with Congolese lawyer (name withheld), Kinshasa, 9 November 2006.
- 3 Office of the Prosecutor, "The Office of the Prosecutor Report on Prosecutorial Strategy", The Hague: ICC, 14 September 2006, www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf.
- 4 In the wake of Lubanga's transfer to The Hague, one military leader in the southern province of Katanga told Human Rights Watch that he would investigate crimes committed by his troops because he did not want to 'end up like Lubanga'. See A. van Woudenberg, *A New Era for Congo?*, Human Rights Watch, October 2006, <http://hrw.org/english/docs/2006/10/19/congo14495.htm>.
- 5 Human Rights Watch interviews with MONUC child protection unit, Bunia, 2 May 2007; Human Rights Watch interview with UNICEF representative, Bunia, 3 May 2007; Human Rights Watch interview with Save the Children representative, Bunia, 3 May 2007.
- 6 Rome Statute, Article 93(10).
- 7 Office of the Prosecutor, "Paper on some policy issues before the Office of the Prosecutor", The Hague: ICC, September 2003, www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.
- 8 Office of the Prosecutor, "Report on Prosecutorial Strategy", op. cit. "[...] The Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."
- 9 For example, the Office of the Prosecutor created a "Legal tools" database, accessible to all states, which is mentioned in Office of the Prosecutor, "The Office of the Prosecutor Report on the activities performed during the first three years (June 2003-June 2006)", 12 September 2006, www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf. During a seminar at the London School of Economics (March 2007), M. Brubacher of the Jurisdiction, Complementarity on Cooperative Division of the OTP, referred to training at, and meetings with, national prosecutors of states partners, notably those that have war crimes units.
- 10 Human Rights Watch, "Democratic Republic of the Congo: Confronting Impunity", Human Rights Watch briefing paper, January 2004, <http://hrw.org/english/docs/2004/02/02/congo7230.htm>.
- 11 Human Rights Watch interview with MONUC human rights official, Goma, 10 May 2007.
- 12 UN General Assembly, "Report of the Special Rapporteur on the independence of judges and lawyers: Addendum – Preliminary note on the mission to the Democratic Republic of Congo," Doc. A/HRC/4/25/Add.3, 24 May 2007.
- 13 See, for example, Human Rights Watch, "Making Justice Work: Restoration of the Legal System in Ituri, DRC", Human Rights Watch briefing paper, September 2004, <http://hrw.org/backgrounder/africa/drc0904/index.htm>.
- 14 In the DRC, ICC crimes fall under the jurisdiction of the military judicial system.
- 15 Trials involving grave violations of international humanitarian law have been conducted before the following courts: military tribunal of Bunia, military tribunal of Songo Mboyo, military tribunal of Mbandaka, military tribunal of Gbadolite, military tribunal of Beni, and the military tribunal of Katanga.
- 16 Human Rights Watch interviews with military prosecutor, Bunia, 30 April 2007 and with military judicial official, Kinshasa, 20 July 2007.
- 17 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007; Human Rights Watch interview with military judge, Bunia, 1 May 2007; Human Rights Watch interview with military judicial official, Kinshasa, 20 July 2007; Human Rights Watch interview with MONUC representative, Kinshasa, 18 July 2007.
- 18 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007.
- 19 Human Rights Watch interview with civilian prosecutor, Bunia, 7 May 2007.
- 20 OTP-NGOs semi-annual meeting at the ICC, The Hague, September 25-26, 2007.
- 21 Article 17 of the Rome Statute provides that cases are admissible before the ICC if the state is "unable or unwilling" to act.

- 21 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007; Human Rights Watch interview with civilian prosecutor, Bunia, 7 May 2007. For specific cases, see Human Rights Watch, "Making Justice Work", op. cit.
- 22 Human Rights Watch interview with MONUC human rights section, Bunia, 2 May 2007.
- 23 This situation would be corrected if the draft ICC implementing legislation were to be adopted, since it gives jurisdiction over ICC crimes to the civilian courts.
- 24 Since the 1970s, the Congolese military judicial system has had a record of inaction toward war crimes over which they have jurisdiction. It is also not appropriate for the military court to hear cases against civilians or for victims to have to recount their stories in front of a uniformed bench which they may associate with their abusers.
- 25 The ICC could perhaps explore the possibility of seeking assurances from the Congolese authorities that the death penalty would not be applied in cases involving ICC cooperation.
- 26 The Mixed Justice Committee was created as a result of an audit of the Congolese judicial system conducted in 2004 by the European Union and several other foreign donors. The Committee is a platform for Congolese government officials, judicial officials and donors to meet and discuss priorities, specific projects and developments in the field of judicial reform. The Committee meets monthly in Kinshasa.
- 27 As reported by a donor participant to the committee meeting, Human Rights Watch interview, Kinshasa, 16 July 2007.
- 28 As mentioned above, the draft implementing legislation of the Rome Statute into Congolese law has yet to be adopted. However, Congo being a monist country, international law is directly applicable and superior to national law and therefore can be applied directly in the absence of implementing legislation.
- 29 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007; Human Rights Watch interview with military judge, Bunia, 1 May 2007.
- 30 Donors involved in judicial reform in the DRC include: the European Commission, France, Belgium, Germany, the United Kingdom, The Netherlands, the United States, UNDP, MONUC.
- 31 Human Rights Watch interview with local military prosecutor, Bunia, 30 April 2007.
- 32 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007; Human Rights Watch interview with military judge, Bunia, 1 May 2007.
- 33 For example, Avocats sans Frontières, "Workshop on the psychology of victims of international crimes and the problems associated with their protection", seminar for Congolese judges, Kisangani, July 2007; Avocats sans Frontières, "Workshop analysing the decisions rendered by the ICC that allow better understanding of the Statute", seminar for Congolese lawyers, Kinshasa, July 2007; International Criminal Bar, Training Seminar, "National and international justice in the fight against impunity", seminar for Congolese judges and counsels, Kinshasa, June 2007.
- 34 Human Rights Watch interview with military prosecutor, Bunia, 30 April 2007; Human Rights Watch interview with military judge, Bunia, 1 May 2007.
- 35 Human Rights Watch, "Justice in Motion: The trial phase of the Special Court for Sierra Leone", Human Rights Watch report, November 2005, <http://hrw.org/reports/2005/sierraleone1105/>.
- 36 For example, the Assembly of States Parties' Working Group in The Hague discussed the impact of the court on national judicial systems as part of discussions on the ICC's Strategic Plan. States parties requested that the court provide more information on its thinking regarding positive complementarity.

8. The International Criminal Court and its Relevance to Affected Communities

Mariana Goetz

Introduction

Victims and affected communities have often been peripheral or entirely excluded from justice processes in response to mass violence. International criminal courts and tribunals since Nuremberg have set out to 'end impunity' with the principal aim of retribution; punishing those responsible and deterring further crimes. In these contexts, victims have been called as witnesses to give evidence but rarely have they had the opportunity to tell their stories or received public acknowledgement of the crimes committed against them. Experience shows that judicial processes, if they treat victims with dignity and afford them a meaningful role, can be an important part of victims' healing. This essay examines the early indications of whether the newly established International Criminal Court (ICC) looks set to avoid past mistakes and ensure that its work is relevant to victims and affected communities.

The story behind the ICC's victim mandate

In July 1998, when the ICC Statute was adopted, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both fully operational, handing down landmark decisions for the worst forms of atrocity. However, neither of these UN bodies was mandated to involve victims in proceedings other than as witnesses. Neither was able to assist victims in need, and neither had an outreach programme to inform victims of what was going on in the courtrooms or to listen to concerns and answer questions. Crucially, neither institution could award reparation, be it restitution of property, medical assistance or compensation for harm suffered.

The disengagement of both *ad hoc* tribunals from affected communities, coupled with the tribunals' physical remoteness from atrocity sites, created negative perceptions of these institutions among many victims. The ICTR is based in Tanzania, about two days' drive from Rwanda, and the ICTY is based in The Hague, a world away from the Balkans. A further difficulty for the ICTR and ICTY was that, besides lacking procedures for victims to be heard and to voice their concerns, neither institution for many years had an outreach programme to inform victims of the proceedings or to engage with them in any meaningful way. The idea of informing victims of court proceedings is still not seen as part of the tribunals' mandate. The ICTY began its outreach programme in 1999, seven years after its establishment.¹ The ICTR followed suit in 2000, for the first time opening an 'info point' in Kigali where information about the trials, as well as broadcasts of court proceedings, are publicly available. Only since 2000 has the ICTR sought to develop a Kinyarwanda section of its website and to translate key decisions into Kinyarwanda.

The outreach programmes of the *ad hoc* tribunals are run entirely on the basis of voluntary funding, obtained through external fundraising (mostly from the European Commission), and are seen as additional, extra-budgetary, non-core functions. This highlights how difficult it has been to convince states that outreach is integral to the mandate of an international court or tribunal, and that without it judicial work has little meaning. Justice must not only be done, but must be seen to be done. As a critical report on the ICTY points out in its title: 'Justice Unknown is Justice Unsatisfied'.²

The ICC's innovations in respect of victims' rights

Unlike its *ad hoc* predecessors, the ICC has a range of innovative provisions in its Statute and Rules of Procedure that are intended to address victims' needs. Embedding obligations in the Rome Statute was largely an attempt to overcome difficulties experienced by the *ad hoc* tribunals and other judicial institutions, particularly in Latin America. By the time the Rome Statute was adopted in 1998, there was already considerable international agreement on the way in which victims of atrocities should be treated in judicial processes. Consequently, the Rome Statute largely incorporated all of the international standards on the treatment of victims in the ICC's judicial proceedings.³ Thus, the ICC has all of the ingredients of a victim-sensitive criminal tribunal. The question now remains how these provisions are interpreted and implemented.

The ICC's innovative, victim-centred provisions include: informing victims of decisions that concern them; victims' participation in proceedings as well as legal aid for their representation; measures for victims' protection, support and assistance; and the ability to claim reparation. The inclusion of provisions that oblige the Prosecutor and the Registrar to inform victims of specific decisions underscores the importance of outreach in the Rome Statute. This allows for stronger arguments that outreach must be conducted as a core function of the ICC, and paid for out of the Court's regular budget. Perhaps the most significant and challenging innovation is the right of victims to participate in proceedings as independent parties with their own lawyers.⁴ Victims have explained that such forms of moral and legal recognition can be more valuable than financial compensation.⁵

Reaching out to affected communities ⁶

The Court's legal framework includes instances in all phases of the proceedings where either the Prosecutor or the Registrar must inform or notify victims of key decisions.⁷ However, effective outreach goes beyond simple notification and must be a two-way process that is both proactive and reactive. It is a dialogue that can raise awareness of the ICC's existence, mandate and victims' role within it. Equally, it can allow for questions to be answered and victims' concerns to be heard. It is crucial that outreach targets key audiences – particularly the communities most directly affected by the crimes in question.⁸ Outreach must also be country-specific. In Uganda, for example, the public has often demanded that the government withdraw the case it referred to the ICC. This is impossible, as once a situation is referred to the ICC, the Office of the Prosecutor independently

investigates and draws up its cases. However, the Court has not had a sufficient presence in Uganda to engage with such debates and to explain its mandate.

In the first few years of work, the ICC struggled without a proper outreach unit or programme budget. However, due to pressure from NGOs, States adopted a significant outreach component in the Court's 2007 budget. Since 2007, the Court has recruited situation-specific staff and developed its initial strategies. Local activities are now being carried out to varying degrees in the different situation countries and logistical support is generally available to engage with key audiences.

In Uganda, the ICC is demonstrating its ability to reach a variety of audiences and media, including by directly engaging with affected communities, holding events in internally displaced persons' camps and using street theatre. Sources on the ground have observed a notable increase in the Court's activities in 2007. Previously, local NGOs organised information sessions and invited the Court to speak, which often resulted in NGO staff being mistaken for ICC personnel. The improved security situation in northern Uganda resulting from the current peace talks has allowed access to war-affected areas. With the recent arrival of a new head of the ICC's Uganda field office, further progress is expected in 2008.

In Sudan, outreach has taken place outside of the country due to ongoing violence and the non-cooperation of the Khartoum Government. Outreach activities appear to have been relatively successful, though more expensive to organise. Further activities targeting refugees in camps in Chad have been undertaken and the distribution of picture-based materials adapted for illiterate populations is being prepared. However, Chad's security situation may hamper future initiatives.

The Democratic Republic of Congo (DRC) is in a state of 'phase 4 security' according to the UN's classification system. Consequently, outreach activities have been confined to Kinshasa and Bunia and do not extend to the vast rural areas where most Congolese victims of mass violence live. Outreach activities rely heavily on television and radio and less on direct interaction with key stakeholders. Affected communities without access to television and radio are left uninformed.

Outreach impact

At present, ICC outreach field-staff have limited capabilities on the ground. Consequently, in-country activities are poorly equipped to respond to unfolding political developments. In all situation countries, a common remark has been that 'the Court is not present.' In time, outreach field offices will make a difference but the lack of senior country staff remains problematic.

In addition to responding to sensitive political developments and dealing creatively with security restrictions, successful outreach hinges on managing expectations. While victims have a legitimate right to seek legal recourse for the crimes committed against them and to claim reparation, experience shows that not all victims wish or desire to do so. It is also likely that reparations, if granted, will be collective and may not satisfy all victims.

Sustained dialogue with victims and affected populations can help reduce frustration and disappointment. Finally, regarding the Court's capacity to monitor and evaluate outreach, it is problematic that this function is coordinated from The Hague, when it should involve core partners at the country level.

Victim participation in ICC proceedings

As South African Justice Albie Sachs stated, 'Justice is not only in the outcome. It must be in the process.' Indeed, the process can be important for victims' healing, and as such international standards on victims' rights provide that victims should have opportunities to voice their concerns. The ICC incorporated these rights, borrowing somewhat from the French and other civil law legal systems that allow victims to participate in criminal trials as *parties civiles* or civil parties.

Participating in an investigation or situation

Through its decisions so far, the ICC has established that victims can participate in proceedings from the start of investigations, even before there is a case against an accused.⁹ This has proven controversial. If there is no accused, then there are no specific crimes listed from which victims would have suffered. Nonetheless, the Court has held that if victims in a situation under investigation have suffered as a result of any of the crimes under the Court's jurisdiction, they can be admitted as participants and obtain legal aid.¹⁰ Thus, the scope for victim participation in the four situation countries under investigation is, in theory, very broad.

Despite the controversy and the Prosecutor's sustained opposition to victim participation at this early stage¹¹, there are good arguments for encouraging participation from the commencement of the investigation. Foremost, victims have a distinct interest in how the Prosecutor frames his cases. If his cases do not reflect the reality of victimisation, then victims will be denied the opportunity to participate, to provide their own versions of what happened, to share their collective memories or to obtain reparation.¹² Indeed, the Court's landmark decision of 17 January 2006 found that it was specifically at the investigation phase that the interests of the Prosecutor and those of the victims diverge the most.¹³ At this stage the Prosecutor's interest may be expediency; to construct a 'winnable' case. The Prosecutor may therefore consider few charges that do not reflect the extent or nature of victimisation. Victims, on the other hand, often want history to record a representative story of what happened in their community so that they can begin to heal.

It will take time to assess fully the consequences of victims' participation in the investigation phase. For the moment, victims have been granted legal standing in three of the ICC's situations, namely the DRC, northern Uganda and Darfur, confirming the principle of victim participation and rejecting the Prosecutor's arguments. However, admitting the victims to the process has been very slow, and as yet the victims have not been able to participate in a meaningful way. They have no direct contact with the Court, and are represented by lawyers in The Hague, in what is a foreign and remote process.

Participation in a particular case

Participation in cases is less controversial. So far the Prosecutor has supported victims' involvement once he has framed his case. Victims' participation in a specific case may increase their chances of obtaining reparation and may provide important opportunities to tell their versions of what happened during the conflict. However, the extent to which victims will be able to participate remains to be seen.

In the case against Thomas Lubanga¹⁴, the only crimes levelled against the accused are the war crimes of child recruitment, enlistment and involvement in hostilities.¹⁵ This implies that only former child soldiers who were recruited or used as soldiers by Lubanga's rebel group when they were under fifteen may be able to participate in this case. However, Lubanga's rebel movement committed widespread murder, rape, torture and pillaging. The population considers these crimes, rather than child recruitment (which is often seen as a necessary 'service' during conflict), as representative of the violence inflicted by Lubanga.¹⁶

A similar scenario arises regarding the charges brought against the leaders of the Lord's Resistance Army (LRA) in the northern Ugandan conflict¹⁷ and against Ahmed Haroun and Ali Mohamed Abdel Rahman 'Kushayb'¹⁸ in the Darfur situation. In these cases, the breadth of the charges is much greater. However, the crimes are narrowed to a few specific incidents on specific dates in particular villages. Lawyers representing victims from Darfur have found that the limitation of charges has diminished their clients' chances of securing legal recourse or reparation from the ICC. One victim's lawyer said, 'Imagine raids on villages: thousands upon thousands of individuals' personal interests are affected. If you select between 5 and 100 victims, how can you forecast that these incidents will match the Prosecutor's? Our contacts with the investigative arm of the Prosecutor's office have not been particularly fruitful as yet.'¹⁹

Challenges of making participation work

At the time of writing, only four victims are participating in the Lubanga trial, and only 17 victims in all cases and situations. Apart from the narrowness of the charges, which are determined by the Prosecutor, the challenges in making victim participation work effectively within the parameters set by the Prosecutor's cases seem to be mostly practical at present. Some of the challenges are outlined here:

a) Security concerns

Among the most significant obstacles to victim participation is insecurity. Darfur, eastern DRC and Central African Republic continue to experience varying degrees of violence, with northern Uganda benefiting from an uncertain peace. Fear of reprisals from indicted warlords is widespread. Even if Lubanga is now in custody in The Hague, his allies and supporters are still active on the ground in eastern DRC, and have been known to threaten intermediaries, reducing possible contacts with their clients, as well as possibilities of undertaking outreach.

b) The long and complicated application forms

The victim application process is lengthy and onerous in terms of having to provide proofs of identity²⁰ or other documentary evidence (eg. medical records) without any financial assistance from the ICC. In addition to the fact that application forms are 17 pages long, these are not translated into local languages and are confusing even to lawyers.²¹

Completing the forms requires local intermediaries to help and to support the victims – most of whom are illiterate and live in remote and/or dangerous areas that the ICC generally does not visit. Intermediaries have sought to obtain minimal reimbursements for making photocopies of the forms or for other minor costs, but the position of the ICC's Registry is that it cannot assist the applicants in this way. Intermediaries receive only minimal training on how to help victims fill out the forms. The Registry has stated that it can provide information, training and copies of the applications, but it cannot assist individuals in applying as it is a neutral body and such assistance could amount to a bias incompatible with a fair trial. Invariably forms have been sent to the Court incomplete or with mistakes, causing delays to the process. On the ground, affected communities and local human rights groups have been frustrated by the lack of support.

c) Lack of legal aid during the application phase

Local intermediaries are not lawyers and often do not understand the fundamentals of the process, such as the difference between participation in the case or situation. More problematic is that they do not necessarily know how to help the victim frame his or her version of events to coincide with crimes within the Court's jurisdiction, either in terms of timing – the Court can only consider crimes committed after 1 July 2002 – or substance. For instance, children who may have been recruited as child soldiers often describe the crime they have suffered as a brutal and traumatising 'abduction.' However, it is the training and use of children in the conflict that constitutes the crime. The details of their training or involvement with the armed group are regularly omitted. It is unrealistic to expect a layperson to identify such an omission, but the consequence is that the applicant would not satisfy the requirements to participate in a case about child recruitment. Because there is no legal aid during the application phase, many forms have not been filled out fully and correctly, causing major delays to victim participation.

d) Modalities of participation

A further concern for victim participation is the remoteness of the process. If victims are represented remotely by a lawyer in The Hague, how meaningful is the process to them? Victim participation in the Lubanga case has allowed victims' lawyers to make statements on their behalf during proceedings. The first experiences have shown that such participation is valuable, particularly if the lawyers are themselves from the situation country and have first hand knowledge of how events on the ground unfolded. This can facilitate the filling in of critical evidential gaps left by the Prosecutor. While remote representation is invaluable to ensure that history is recorded accurately from victims' perspectives, questions remain about how victims themselves can experience the process more meaningfully.

One issue the ICC is currently exploring is the feasibility of *in situ* hearings or trials. Moving the accused to locations nearer victims could be a security risk. However, other formats could also be explored, such as including only the counsel of the accused in these hearings. Another strategy to assist the application process would be for the Registry to hold administrative hearings, without the accused or judges, simply to record victims' stories (where it is safe to do so). NGOs and lawyers have also discussed the possibility of collective victim participation, as this may prove more efficient both for the victims and the Court. Victims often see themselves as members of a victimised community or group and not as isolated individuals. As they will be represented collectively and probably receive reparation collectively, there may be some sense in facilitating applications on behalf of a group.

Conclusion: the Court must enable victims to play their part

The provisions in the ICC's Statute and Rules for fulfilling victims' needs are promising. However, at present, there is a widespread view within the ICC that victim participation is an obstacle to the Court's primary objective of ensuring fair trials, rather than a central aim. Ensuring that justice gives effect to victims' rights is not seen as a measurement of the Court's success. It would appear that the consensus at the ICC is that token victims should be allowed to participate, but that opening the floodgates to all eligible victims is a problem that could delay and mar proceedings. However, the very nature of genocide, war crimes and crimes against humanity implies vast numbers of victims, as these are crimes of mass violence. Therefore, vast numbers should be the starting point for devising practical mechanisms to make victim-oriented processes work. As well as shifting its overall stance toward victim participation, the Court must extend legal aid to the application phase, further support intermediaries, simplify forms and streamline the process to bring it closer to the victims, either through *in situ* hearings or other means.

On outreach, the ICC is having to make up for lost time and missed opportunities stemming, in part, from early budget constraints. As the Court does this, it must ensure that its outreach work adapts to sensitive and fluid political situations; that it finds creative solutions to security constraints; and that it effectively manages local expectations.

Ultimately, the ICC will be judged by local public opinion, as has been the case in international criminal proceedings for Rwanda and the Balkans. Reflecting this reality in the Court's vision and goals from the outset would help it interpret its mandate. Unlike its precursors, the ICC is fortunate to have a mandate, enshrined in the Rome Statute, that fully provides for victim involvement. The question is how far the ICC will learn from past mistakes and creatively interpret its provisions to render it a truly victim-sensitive court.

1 K. Cibelli and T. Guberek, "Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International Criminal Tribunal for the Former Yugoslavia", Tufts University, 1999.

2 Ibid.

3 There are two influential texts governing international standards on victims' rights. The first is the 1985 Declaration of Basic Principles for Victims of Crime and Abuse of Power (commonly known

as the “Victims’ Declaration”) UN Doc. GA/Res/40/34. The second key text is the 2006 “Basic Principles” document, focusing on victims of international crimes (its full name is the “UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 2006). The UN principles on victims’ rights had a very significant impact on the ICC Rome Statute.

- 4 Rome Statute, Article 68(3) and related Rules 85, 89-93 of the Rules of Procedure and Evidence.
- 5 See A. Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence” in E. Stover and H. Weinstein, (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge: Cambridge University Press, 2004, p. 126-7. The Chilean Human Rights organisation, CODEPU, under the auspices of the Association for the Prevention of Torture, interviewed about 100 individuals and groups of family members of disappeared and summarily executed victims in Chile, Argentina, El Salvador, and Guatemala.
- 6 This article focuses on outreach and victim participation as examples of the challenge areas. It is notable, however, that protection (including psychosocial protection), support and assistance as well as the ability to claim reparation are equally relevant and important elements to the Court’s victim mandate.
- 7 See, for example, Rule 92(3) of the ICC Rules of Procedure and Evidence.
- 8 This includes former combatants. Victims and witnesses are especially vulnerable in contexts where ex-combatants who may feel threatened by the judicial process are ill-informed or misinformed.
- 9 See Pre-Trial Chamber I, “Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, The Hague: ICC, 17 January 2006
- 10 According to Rule 85(a) of the ICC’s Rules of Procedure and Evidence, victims are defined as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.
- 11 See various attempts of the Prosecutor to appeal the precedent set by the Pre-Trial Chamber: “Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation”, filed 23 January 2006, Case No. ICC-01/04, www.icc-cpi.int/library/cases/ICC-01-04-103_English.pdf and the “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, Case No. ICC-01/04, www.icc-cpi.int/library/cases/ICC-01-04-143_English.pdf
- 12 Article 75 of the ICC Statute provides the basis for reparations proceedings. Article 79 establishes the Victims’ Trust Fund from which reparations awards will be disbursed.
- 13 *Ibid.*
- 14 The Prosecutor v. Thomas Lubanga Dyilo, Case ICC-01/04-01/06; www.icc-cpi.int/cases/RDC/c0106/c0106_doc.html
- 15 Article 8, sub article 2(e)(vii), of the Rome Statute, defines the crime as “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”. For a broad analysis of child soldiers and the International Criminal Court, see M. Goetz, “Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court”, REDRESS, September 2006, www.redress.org/reports.html
- 16 See ACCESS, “Reactions to Lubanga Confirmation in Bunia”, ACCESS, Issue 8, Spring 2007, p.8, www.vrwg.org/Publications/04/ENG08.pdf
- 17 The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case ICC-02/04-01/05; www.icc-cpi.int/cases/UGD.html
- 18 The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case ICC-02/05-01/07, were indicted on 1 May 2007. www.icc-cpi.int/cases/Darfur.html
- 19 Interview with Darfur victims’ lawyer, in ACCESS, “Sudan Victims’ Lawyers recount their experiences with the ICC so far”, ACCESS, Issue 9, Summer/Autumn 2007, www.vrwg.org
- 20 See the Pre-Trial Chamber decision in the DRC Situation, Pre-Trial Chamber 1, “Decision on the Applications for Participation in the Proceedings”, *op. cit.*
- 21 There is some confusion in the form concerning the ability of applicants to apply on behalf of deceased persons, and whether they or the deceased person is the “victim”.

9. One among Many: The ICC as a Tool of Justice during Transition

Graeme Simpson¹

Introduction

The establishment of the International Criminal Court (ICC) marked a potential shift from the administration of international criminal law by means of transitory, short-lived tribunals. The Court's establishment was a remarkable achievement in itself – a product of almost unprecedented international cooperation geared toward redressing crimes against humanity, war crimes and genocide. After more than five years since its establishment, and with its first active trial (that of Thomas Lubanga), the ICC has finally made the shift from conception to reality; from the realm of legal policy to the pragmatic sphere and the dilemmas of implementation.

The ICC's first steps, however, have been marked by heated controversy. Much of this controversy relates to the highly complex endeavour at the heart of the Court's mandate: to translate global legal obligations into functional justice at the local level. In this relationship between the global and the local, the Court confronts challenges on multiple fronts. These include demands concerning the dynamics between the Court and victims and affected communities; the challenges of investigation and enforcement in the context of reliance on national actors; and the limitations of the Rome Statute's incorporation into domestic law. The ICC faces further contestation over jurisdictional boundaries as a court 'of last resort' and over issues surrounding the political will and practical reach of the state in societies moving from war to relative peace.

It is also significant that all of the Court's investigations during this early period have been in Africa. In view of Africa's anti-colonial struggles and the enduring discourse around sovereignty and national self-determination, it is hardly surprising that these debates centre on the relationships among local, national and international justice approaches. This is despite the prevalence of African signatories to the Rome Statute. Tensions are not only expressed in terms of legally-defined jurisdictional issues but also in respect of the Court's 'cultural relevance' in the local context as an embodiment of 'western' legal norms. These debates have dwelt on uncomfortable tensions (some would even say the dichotomous relationship) between the claims of international justice and local or national attempts to build peace and reconciliation.

This essay examines the role of the ICC as a transitional justice mechanism, with a particular focus on debates about the relationship between peace and justice. It highlights how narrow conceptualisations of both justice and peace processes set the ICC up to fail. In particular, such narrowness isolates the Court from the range of available accountability mechanisms which may cumulatively complement rather than contradict the objectives of building durable peace, in the best interests of victim communities.

Peace and justice

Trite statements that ‘there can be no peace without justice’ ignore the fact that efforts to prosecute those most responsible for international crimes confront compelling reasons for indemnifying warring factions in order to cement peace processes. To recognise these tensions, however, need not imply that national peace processes and international legal obligations are inherently incompatible. On the contrary, in appreciating that peace and justice tensions can and do occur, we should not miss the fact that there is scope for peace-building to complement accountability.

Unfortunately, such opportunities are all but overlooked in much of the current debate concerning African conflicts and the ICC’s prosecutorial strategies. Coverage of these issues frequently betrays a reductionist approach to peace and to justice and a fixation on the ICC and prosecutions at the expense of a host of accountability tools whose careful deployment can help to ensure that social conflict finds non-violent expression.²

Prevailing discussions of peace, justice and the role of the ICC can be challenged on two essential counts. First, the ICC represents one instrument in a panoply of available judicial and non-judicial mechanisms. Justice during transition involves much more than punitive judicial accountability meted out through ICC prosecutions. In contexts of massive violations, no criminal justice system can prosecute all of those responsible. This tends to be because of the scale of the violations combined with limited capacity and/or an historically politicised criminal justice system. Furthermore, in many such conflicts, the line between victim and perpetrator is frequently more blurred than neat assumptions sometimes suggest. The ‘impunity gaps’ that inevitably result demand other forms of accountability that stretch well beyond the limited reach of the ICC or even beyond more accessible domestic or local judicial processes.

If the threat of ICC prosecutions presents short-term dilemmas for fragile peace negotiations, then these other forms can enhance the transition from violent conflict. Ways of addressing fractured relationships include truth seeking projects, symbolic or material reparation for victims, and efforts at building civic trust through the transformation of state institutions that were responsible for past violations. A failure to recognise the ICC as just one accountability tool among many weakens it considerably. It also fuels the unhelpful assumption of incompatibility between peace processes and accountability mechanisms, rather than recognising that diverse judicial and non-judicial accountability mechanisms can support peace-building rather than compromise it.

If the first assertion challenges a narrow conception of justice and the ICC’s role in that, then the second is premised on a similar concern about narrow definitions of peace-making and the failure to distinguish between *positive* and *negative* peace. At its most basic, this is a distinction between peace processes that prioritise ending violence in the shorter term, as opposed to building more durable peace through addressing the underlying causes of violence. Peace processes tend to be treated as if they constitute the beginning and the end of the peace-building process. This obsession with the fraught negotiations stage (whether mediated or not) risks exclusive investment in short-term responses to violence. Such a focus undermines attempts to address the deeper underpinnings of violence or

to anticipate some of the fault-lines for its potential re-emergence. The richness of the peace-building discourse recognises that the process potentially begins long before peace negotiations commence and inevitably continues long after they conclude. To mistake peace negotiations as the sum total of peace-building robs the concept of its value. It also inevitably frames the relationship between the imperatives of peace and justice as fraught because of the narrow reference to short-term negotiations where those with blood on their hands sit at the table and play a key role in defining the available options.

As long as justice is treated as synonymous with prosecutions alone and peace-building is reduced to the process of negotiating peace agreements, then peace and justice will remain at loggerheads. An alternative approach to transitional justice recognises the potential for a *peace and justice continuum* in which diverse accountability mechanisms can contribute to peace-building efforts, rather than compromise them. In this framework, the ICC is but one mechanism among many. If the tensions between peace-making and demands for justice are at their height during the negotiations phase, then a contextualised approach to the sequencing and timing of these diverse interventions may catalyse a closer relationship between accountability and peace-building, both before and particularly after the more fragile periods of mediation.³

These questions of sequencing and timing are not matters of high principle but rather of strategy and context. They involve an assessment of what is possible in the circumstances – including what can be done to maximise the prospects for future accountability where this cannot be achieved in the immediate term. A priority concern must also be to broaden the base of accountability, to ensure that it is more victim-centred. That is, the needs of victims, rather than just an obsession with perpetrator accountability, must remain at the heart of the process.⁴

Nowhere has the presentation of a dichotomous relationship between peace and justice been more apparent than in debates around the peace negotiations between the Ugandan government and the Lord's Resistance Army (LRA).⁵ Yet the very fact that Agenda Item Three in the Juba negotiations deals explicitly with modalities of 'accountability and reconciliation'⁶ illustrates a significant shift in the global legal landscape since the establishment of the ICC. This shift really took place over a period of nearly 20 years (and so the ICC is as much a product as progenitor of this development). Crucial to this story have been the operation of regional human rights courts, the *ad hoc* and hybrid tribunals, the rise of prosecutions based on universal jurisdiction, growing pressure from national and international NGOs for accountability for mass atrocities and, of course, the establishment of the ICC and ratification of its statute by more than 100 states. The result has been a growing global consensus that blanket amnesties are both unacceptable and unenforceable.

In terms of agreements brokered by the United Nations, this shift was also reflected in the Secretary General's 2004 report on 'Transitional Justice and the Rule of Law', which explicitly precluded UN mediators from presiding over agreements that granted amnesty for international crimes.⁷ That these questions are on the agenda at all creates the space for marshalling an array of mechanisms to optimise accountability without compromising broader peace-building objectives. Whether at Juba or in the implementation of the Colombian Peace and Justice Law⁸, there is space to negotiate the elements of 'sufficient

justice' to satisfy international legal obligations while simultaneously pursuing a peace-building agenda.

Despite this space, there are discernible but often unnecessary tensions among human rights practitioners, peace-builders, humanitarian workers and conflict mediators. Put simply, human rights practitioners can no more afford to discount the importance of ending conflict and preventing ongoing violations, than peace-builders, humanitarian workers or mediators can afford to disregard the contribution of various forms of justice and accountability to achieving durable peace. Renewed violence makes commitments to human rights abstract and meaningless, while sustained impunity threatens the durability of peace processes. This should drive proactive collaboration amongst those from different fields and should help to overcome the idea that those seeking accountability are merely insensitive to the priority of ending the bloodshed.

The priorities of victims and affected communities

It is unsurprising that within the polarised debates about peace and justice, human rights advocates and peace-builders alike are inclined to invoke generic needs and expectations of victims of the conflict. Either the assumption is made that victims and survivors have some inherent interest in punitive justice through the criminal justice system, or that they are more interested in peace, development and food security. The disagreements often turn on unhelpfully aggregated and static identities representative of competing versions of an archetypal victim, on whose behalf numerous actors claim to speak. In this context, it should be underlined that victim communities do not articulate such homogenous views and are themselves fractured and fragmented, along with the societies from which they come. Furthermore, victims' needs and expectations change over time. Evidence from the field shows that the aspirations and needs of victim communities most affected by the conflict are subtle, fluid and frequently reflect a complex integration and sequencing of changing needs and expectations, themselves heavily dependent on the state of the peace process and the prospects for justice at any particular time.⁹

The hazards of simplified categorisations of victims' views were powerfully illustrated in the responses of 'ordinary' displaced victims of the conflict in northern Uganda.¹⁰ Survey results based on a sample of 2,585 people in four districts (both Acholi and non-Acholi) showed that when asked in an open-ended question to list their immediate needs, 31% answered that they wanted peace, 34% prioritised food security, and only a tiny percentage prioritised justice in various forms. However, when pressed on the relationship between peace and justice, 38% said there must be justice once there was peace. Twenty-one per cent went on to specify that this must be within six months, 12% within one year, 9% within two years. Only a tiny percentage (less than 5%)¹¹ of those surveyed indicated that justice issues should not be addressed at all. These are unsurprising results for displaced and impoverished populations ravaged by war and driven into internally displaced persons camps at a time when the Ugandan peace process, at best, appeared to be faltering (this survey was conducted before the Juba process commenced). While the immediate needs of these victim communities may well be for an end to the war, it is

clear from these results that this is not necessarily as an alternative to justice, but rather – in a complex sequencing of their own immediate needs – as a precursor to it.

This perspective is important in addressing claims that victims are more interested in peace than in justice. But it is equally important to recognise that, as the traction of the peace process changes and as the prospects of negotiated peace grow, victims' needs and expectations may well shift. For the ICC, this also presents a key challenge to the Court's aspiration to provide reparation through the Victims' Trust Fund – at best a clumsy tool for addressing these shifting and complex needs, even of the highly select group of victims that will have access to the Fund. If reparation is an important accountability mechanism for victim communities, then failure to take account of the changing needs and expectations of victims groups could mean that – in this role – the Court is at risk of doing more harm than good. Beyond the crude tool of monetary compensation, defining victim-centred and credible approaches to reparation has the potential of a critical *peace dividend* which could contribute substantially to civic trust and to the durability of peace-building. Alternatively, reparations that are perceived as unfairly selective or that disappoint expectations, could prove highly divisive. As such, reparations risk becoming the new rallying cry of re-mobilised discontent, and with it, the potential for a return to conflict. A tool such as the ICC, designed for the narrow accountability that is an imperative of prosecution processes, is perhaps not best-placed to address the expectations that come with promises of reparations. Reparative processes are in any event fraught, expensive and highly technical, without the constraints of the Court as an implementing agency.

From the local to the global

As noted above, one line of criticism has cast the ICC as an imposed instrument of international law with little or no cultural relevance in the local communities it is supposed to serve. Beyond stale arguments about a global human rights discourse having no place in the African lexicon, there is a complex question about the relationship between international instruments and their meaning or proximity to affected communities. This is not neatly resolved by reference to jurisdiction and the principle of complementarity – that is, reflecting the primacy of national court processes and the argument that the ICC only steps in where the domestic courts are unwilling or unable to act. It is more of a question about the relevance of punitive justice within the framework of local justice mechanisms. The question requires a careful assessment of how local justice instruments – which are considerably more accessible to local populations – might sit alongside national and international mechanisms, each serving its distinct purpose in a cumulative effort to tackle the impunity gap in societies emerging from massive violations.¹²

Discussion of such issues scarcely gets started, however, before it is dragged down by a further unhelpful polarisation. At one extreme, these local justice systems are romanticised as being inherently consultative and reconciliatory and therefore fundamentally in tension with the adversarial accountability approach embodied by the ICC. At the other extreme, such arguments are dismissed as cultural relativism and local justice systems are caricatured as atavistic and inherently incapable of ever incorporating the norms and standards of international human rights.

In reality, like all legal systems, local justice mechanisms are in fact contested sites of political struggle. And like any other justice system, they need to be subject to scrutiny for their preventive efficacy and the extent to which they promote sustainable peace and reconciliation. We must recognise the potential to integrate a rights discourse in justice mechanisms that are much more accessible to local populations – as an adjunct to the ICC, rather than necessarily as an alternative to it.

It is clear that the ICC's concern with the boundaries between international and national jurisdiction risks inhibiting its ability to integrate with local approaches to justice. This restriction is at least equally problematic in grappling with conflicts in Africa which frequently do not respect national boundaries but which are sub-regional in their character, logic and origins. This is particularly the case in the overlapping conflicts in the four countries where the ICC is currently investigating crimes – Uganda, Sudan, the Democratic Republic of Congo and the Central African Republic. In its mandate, investigative orientation and entire *modus operandi*, the ICC is focused on addressing national justice solutions (albeit through an international justice instrument) by reference to the boundaries of the nation state in each of the countries in which it operates. This may effectively preclude investigations into the role of regional actors, representatives of neighbouring governments, or global non-state actors. Although the ICC's punitive justice approach is sometimes complemented or ameliorated by non-judicial accountability mechanisms, this is not necessarily the case regarding the need to address the regional character of violent conflicts. Other transitional justice tools tend also to be oriented around the jurisdictional boundaries of the nation state. While there are some important examples of reparation being provided across these boundaries, initiatives such as truth-seeking, institutional reform, reconciliation strategies and memorialisation all tend to be defined by their national orientation. What this means is that the ICC, along with most other transitional justice instruments, still has to come to terms with the challenge of peace-building in the context of violent conflicts that defy the boundaries of the nation state and the associated legal and jurisdictional boundaries that shape justice-based interventions.

Conclusion

The ICC has been established as a 'court of last resort' for crimes against humanity, war crimes and genocide. This responsibility is testament to an international consensus that certain crimes are so heinous that the global community must act to prosecute them, even if the nation state affected chooses not to do so. Where the first preference of domestic investigations and prosecutions is not forthcoming, the ICC is the acknowledged primary vehicle for the administration of international criminal justice.

Despite this formal position on non-derogation, debates continue about whether or not the ICC can, or should, exercise discretion over when to prosecute, based not on availability of evidence, but on political considerations, such as the Court's potentially negative impact on delicate peace negotiations. By contrast, claims are also made that the Court's interventions (with nods to the similar roles of the ICTY and the Special Court for Sierra Leone) have actually driven protagonists to the negotiating table, thus enhancing the prospects for peace. These competing claims – more often than not impossible to

substantiate – have further polarised debates over the compatibility of the objectives of peace and justice in societies emerging from mass violence.

These representations of the ICC as the progenitor of peace processes on the one hand, or as fundamentally incompatible with the logic and demands of peace mediations on the other, compound the inclination to treat the Court's role as inherently in tension with other transitional justice approaches. This detracts from a useful assessment of the ICC's potential and appropriate roles. The prism through which the Court is viewed has been detrimental to thinking about justice, accountability, and peace in a more integrated way, resulting in the goals of peace and justice being considered mutually exclusive.

Yet in many respects this debate is at risk of being outpaced by current global developments that have moved beyond the strictures of the peace and justice dichotomy. A pragmatic approach (often embedded in negotiated processes) is testing the boundaries of *how much justice* is enough to satisfy the obligations of international law. Illustrating the shifting base of the new global legal framework in the wake of the establishment of the ICC, and by reference to either South Africa's conditional amnesty provisions or Colombia's plea-bargain-type peace and justice arrangements, the Ugandan negotiators at Juba have debated the place of the ICC as one among many mechanisms for doing justice during transition. The danger of such situations is that, trading on the discord between human rights and peace-building practitioners, negotiators may create outcomes that are in the interests neither of credible justice, nor of durable peace.

As the ICC becomes a more seasoned institution, it is important for the purveyors of transitional justice and peace-builders alike to recognise and to mitigate these risks. Sequencing different transitional justice initiatives is more easily said than done. Care must be taken during peace negotiations to ensure that short-term concerns do not lead to longer-term judicial accountability being 'designed out' of negotiated settlements where those negotiating are frequently among the primary perpetrators of international crimes. In all of these endeavours, if the ICC is assessed as the only vehicle of justice in the wake of mass atrocities then we set it up to fail. By contrast, if it is viewed as one among many mechanisms for building accountability into peace-building, then the prospects of both durable peace and justice will be better served.

- 1 The views in this paper are those of the author and are not representative of the International Center for Transitional Justice as an institution. I owe a debt of thanks to Briony MacPhee for assistance on an earlier draft of this paper and for her commentary, tirelessly chasing references and generally helping to get this written against all odds.
- 2 See, for example, Z. Lomo, "Why the International Criminal Court Must Withdraw Indictments against the Top LRA Leaders: A Legal Perspective," Refugee Law Project, August 2006; H. Cobban, *Amnesty After Atrocity?: Healing Nations After Genocide and War Crimes*, Colorado: Paradigm Publishers, March 2007; A. Branch, "International Justice, Local Injustice" Dissent, Summer 2004, <http://dissentmagazine.org/article/?article=336>; and J. Ku and J. Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", *Washington University Law Quarterly*, vol. 84, 2007.
- 3 See International Center for Transitional Justice. "Pursuing Justice in Ongoing Conflict: A discussion of Current Practice." Building a Future on Peace and Justice, conference in Nuremberg, Germany. 25-27 June 2007; P. de Greiff, "Contributing to Peace and Justice: Finding a Balance Between DDR and Reparations," Building a Future on Peace and Justice, conference in Nuremberg, Germany. 25-27 June 2007; and C. Diaz, "Colombia's Bid for Justice and Peace," Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007, available at www.peace-justice-conference.info/documents.asp.
- 4 A holistic approach to transitional justice which seeks to integrate these various forms of accountability can go some way to achieving this by addressing the potential – which often exists in prosecutions processes – that victims' interests become subordinated to the primary concern with investigation, conviction and punishment of perpetrators.
- 5 See Lomo, "Why the International Criminal Court Must Withdraw Indictments." For a different perspective see S. Lamony, "Why the ICC is the Best Option for the LRA," *Makerere University Peace Newsletter*, 6, 5, June 2007. Also, see M. Okello, "False Polarization of Peace and Justice in Uganda," Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007; M. Otim, "Traditional justice, the role of the ICC, the Juba peace process, and the humanitarian situation: perspectives from the ground," Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007; A. O'Brien, "The Impact of International Justice in local peace initiatives: the Case of Northern Uganda," Building a Future on Peace and Justice, conference in Nuremberg, Germany, 25-27 June 2007. All available at www.peace-justice-conference.info/documents.asp. See also Refugee Law Project, "Peace First, Justice Later: Traditional Justice in Northern Uganda," Working Paper No. 17, July 2005.
- 6 "Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement", Juba, Sudan, 29 June 2007.
- 7 United Nations, "Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," Doc. S/2004/616, 23 August 2004.
- 8 The Law is aimed at demobilising the paramilitaries in that country. See: La Ley de Justicia y Paz: Ley 975 de 2005 (Justice and Peace Law: Law 975 of 2005).
- 9 See P. Pham, P.Vink, M. Wierda, E. Stover and A. di Giovanni, "Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda", International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley, June 2005; and The Afghan Independent Human Rights Commission, "A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan", January 2005. In part this is also based on my own experience working with victim groups in South Africa over a 15-year period during my work at the Centre for the Study of Violence and Reconciliation (CSVR), www.csvr.org.za.
- 10 Pham, Vink et al, *Forgotten Voices*.
- 11 The *Forgotten Voices* report states that in Gulu and Kitgum, less than 5 percent of the respondents said that justice should never be addressed. The figures are even lower for Lira and Soroti (0 and 2.5 percent, respectively).
- 12 For a cursory discussion of this and the Uganda case, see Refugee Law Project, "Peace First, Justice Later: Traditional Justice in Northern Uganda", Working Paper No. 17, July 2005.



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Established to prosecute those responsible for war crimes, crimes against humanity and genocide, the International Criminal Court has a global mandate. However, its activities have concentrated on African countries marked by ongoing violent conflict. Key recent developments have seen the work of the Court take more concrete shape. In the process, the critical challenges and dilemmas raised by the ICC have also come to the fore. During what is a defining period for the Court, this collection investigates the politics of the ICC's interventions in Africa.

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